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Before the
Federal Communications Commission
Washington, D.C. 20554

FO Docket No. 92-206

In the Matter of

Amendment of Part 13 of the Rules
to Privatize the Administration of
Examinations for Commercial Radio
Operator Licenses and to Clarify
Certain Rules

NOTICE OF PROPOSED RULE MAKING

Adopted: August 21, 1992; Released: September 8, 1992

Comment Date: November 2, 1992
Reply Comment Date: November 17, 1992

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend the Commercial Radio Operator Rules, 47 C.F.R. Part 13, to privatize the examination of applicants for commercial radio licenses, and to clarify certain radio operator rules.

II. BACKGROUND AND DISCUSSION

2. In September 1986, the Commission released a *Notice of Inquiry*[1] (NOI) seeking comments on whether the public interest would be served by allowing a private organization to draft and administer all FCC commercial radio operator examinations.[2] As a result of that proceeding, the Commission sought and obtained an amendment to the Communications Act (*see* Federal Communications Commission Authorization Act of 1990, Pub. L. 101-396, 104 Stat 848; adopted September 28, 1990) authorizing it to delegate the examination of commercial radio operators to a private entity or entities. 47 U.S.C. §154(f)(5).[3]

3. We are now proposing to amend our Rules to implement that provision, and we are requesting public comments on the proposed rules. Commenters should specifically address such issues as (1) the criteria to be used by the Commission to select the examining entity or entities; (2) the regulatory or operating constraints to be placed on the examining entity or entities, including measures to prevent or avoid potential conflict-of-interest situations; (3) the level of control or supervision that should be exercised by the Commission; (4) the amount and reasonableness of fees to be charged by the private entity or entities for the administering of radio operator examinations; (5) the minimum number and geographic location of examination sites necessary to conduct the examinations; and (6) the capability of the private entity or entities to design and administer examinations for all classes of radio operator licenses. Organizations interested in potentially becoming examiners should also provide estimates of anticipated or projected expenses and costs for administering such examinations.

4. The Commission continues to face resource constraints that prevent it from drafting and revising commercial radio operator examinations often enough to ensure examination integrity and from administering the examinations more than twice a year. Presently, the examinations are administered by local FCC offices at limited sites. Moreover, a review of the licensing process disclosed that many applicants for commercial radio operator licenses were not required by the Commission to have a license for the work they intended to perform. Available information indicated that many employers impose a license requirement as a condition of employment because it represents to them an indicator of job competency. In a 1984 *Report and Order*,[4] the Commission eliminated rules that only permitted licensed commercial radio operators to perform transmitter maintenance, adjustments and servicing in the Private Land Mobile, Private Operational-Fixed Microwave, and Personal Radio Services. The Commission reasoned that in those services it should be the station licensees who should be ultimately responsible for ensuring the qualifications and training of their personnel. Nevertheless, the demand for commercial radio operator licenses continues and we believe that turning the examination function over to the private sector will result in more updated and relevant competency determinations to hold such licenses.

5. Currently, the Commission has seven types of commercial radio operator licenses and two types of endorsements.[5] A new class of license, the Global Maritime Distress and Safety System Radio Operator's License (GMDSS), has recently been created, and is expected to be issued beginning in September 1992.[6] The GMDSS license will be a five-year term license. Four of the other classes of commercial radio operator licenses are also five-year term licenses, and two classes of licenses are valid for the lifetime of the holder.[7] At present, five-year licenses may be renewed without re-examination anytime during the last year of the license term up to five years after expiration of the license.

6. In May 1990, the Commission, pursuant to statute, began charging a fee for processing almost all commercial radio operator license applications.[8] The $35.00 fee was established by Congress. *See* 47 U.S.C. §158(g). That amount had been determined to be the minimum fee to ensure that the costs of collecting the fee did not exceed the potential necessary revenues derived from the fee assessment. Although the fee amount was set at the minimum necessary to reflect current Commission costs for administering the examinations, the establishment of the fee does not permit the Commission to increase the frequency of examinations or their site availability. The statutory fees collected by the FCC for the administration of examinations are deposited into the General Fund of the U.S. Treasury, and do not augment the agency's appropriation in any way.

7. Approximately 4,400 new and 600 duplicate and/or replacement General Radiotelephone Operator Licenses (GROLs) are issued each year by the Commission. The Field Operations Bureau's Radio Operator Branch staff has issued approximately 900 new, duplicate and/or replacement radiotelegraph licenses each year. Additionally, approximately 3,200 marine radio operator permits and a

combined total of approximately 100 Six-Months Service Endorsements and Ship Radar Endorsements are issued annually.

8. The recent adoption of the GMDSS Radio Operator's License will lead to an increase in the total number of applications for radio operator licenses. All applicants for this license will be required to successfully complete an examination. Applications for examination and issuance of the new GMDSS class of radio operators are therefore expected to add resource burdens to the Commission's license issuance process. Examination for the GMDSS radio operator license would also be handled by the private examiner or examiners eventually selected.

9. Privatization of commercial radio operator examinations will require changes in our current processes for issuing licenses. Since local offices will no longer administer examinations, there will be no need to have a fragmented license-issuance process by FCC local offices. The operation will therefore be shifted to one central location, and will be more efficient and economical.

10. Finally, we are proposing some "housekeeping changes" to our Part 13 Rules primarily intended to clarify application procedures and eligibility criteria. Section 13.12(b)(3) of the Rules is amended to clarify who may sign certifying statements.[9] A change to Section 13.74 clarifies posting requirements when the original license has been submitted to the Commission as part of an application process.

III. CONCLUSION

11. Due to budgetary constraints, the Commission can presently offer commercial radio operator examinations only twice each year at twenty-five (25) local offices. Many major population areas do not have FCC offices. Therefore, many applicants must travel great distances to sit for commercial radio operator examinations. That is done at considerable expense to those applicants who incur travel and hotel expenses. Private examiners, hopefully, will be able to offer more frequent examinations in much more diverse and accessible locations. Moreover, private examiners may be able to provide examinations on demand by charging an additional fee to applicants for providing that special service. The Commission will be able to streamline the issuance of licenses by centralizing the process.

12. Therefore, the Commission seeks comments on how the entity or entities should be selected to administer the commercial radio operator examinations. Comments from potential private contractors, including the private sector and organizations such as associations, universities, colleges or other testing facilities are invited. As indicated above, commenters are urged to address the selection criteria which should be applied by the Commission; whether there should be one or more examining entities; the type and extent of control and supervision the Commission should impose on the examiners and the examination process; and the number of geographic locations of examination sites.

13. The other rule changes we are proposing in this *Notice*, such as limiting the category of officials signing a certification statement for purposes of granting an endorsement under Section 13.12(b) of the Rules or addressing license posting requirements, are primarily administrative processing clarifications. Currently, the Commission receives applications for Six-Months Service Endorsements accompanied by certification statements signed by ship company officials and personnel. Section 13.12(b)(3) allows applicants for the Endorsement to demonstrate satisfactory service by submission of statements signed by "ship station licensees, masters or commanding officers of U.S. ships . . . ".[10] Often the statements received are signed by personnel staff and other ship company staff who have no direct knowledge of the applicant's service. The Commission must then write for additional or clarifying information. That slows down the licensing process. Therefore, changes have been made to Section 13.12(b) which are intended to clarify who may sign certification statements. The additional proposed changes, are intended to further clarify application requirements, eligibility criteria, or licensing procedures.

IV. PROCEDURAL MATTERS

14. **Initial Regulatory Flexibility Analysis.**

Reason for Action: This Rule Making proceeding is initiated to obtain comments concerning proposed rule changes to Part 13 of the Commission's Rules regarding the privatization of commercial operator license examinations and the clarification of other Part 13 Rules.

Objectives: The Commission seeks to promote excellence and efficiency in the licensing of commercial radio operators by increasing the availability, effectiveness and competency of commercial radio operator examinations and reducing government expenses.

Legal Basis: The proposed action is authorized under Sections 4(f)(5), (i) and (j), 301, 303(l) and (r), and 318 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(f)(5), (i) and (j), 301, 303(l) and (r), and 318.

Reporting, Recordkeeping and Other Compliance Requirements: None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules: None.

Description, Potential Impact, and Number of Small Entities Involved: Any rule changes adopted as a result of this proceeding may affect various small entities that may become or apply to become examiners for Commission commercial radio operator licensing purposes.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives: The Notice solicits comments dealing with and addressing a variety of alternatives regarding the proposed action.

15. **Ex-Parte Rules - Non-Restricted Proceeding.** This is a non-restricted notice and comment rule making proceeding. Ex-parte presentations are permitted except during the Sunshine Agenda periods, provided they are disclosed as required by Commission Rules. *See generally* 47 C.F.R. § 1.1202, 1.1203, and 1.1206(a).

16. **Comment Dates.** Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **November 2, 1992** and reply comments on or before **November 17, 1992.** To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C.

20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

V. ORDERING CLAUSES

17. Accordingly, IT IS PROPOSED that, pursuant to the provision of Sections 4(f)(5), (i) and (j), 301, 303(l) and (r) and 318 of the Communications Act of 1934, as amended, 47 U.S.C. 154(f)(5) (i) and (j), 301, 303(l) and (r) and 318, Part 13 of the Commission's Rules and Regulations BE AMENDED as set forth in the Appendix below.

18. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i), 4(j), 4(f)(5), 301, 303(l), 303(r) and 318.

19. IT IS FURTHER ORDERED, that a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

20. For further information on these proceedings, contact Leonard R. Langley, Chief, Radio Operator Branch, Public Service Division, Field Operations Bureau, Room 728, 1919 M Street, N.W., Washington, D.C. 20554, (202) 632-7240, or Ana Janckson-Curtis, Attorney Advisor, Public Service Division, Field Operations Bureau, Room 728, 1919 M Street, N.W., Washington, D.C. 20554, (202) 632-7240.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Title 47 of the Code of Federal Regulations, Part 13, is proposed to be amended as follows:

1. The authority citation for Part 13 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended; 47 U.S.C. 154, 303.

2. Section 13.2 (d) is amended by deleting subsection (d) in its entirety. These licenses and endorsements are no longer issued. All outstanding classes of such licenses have now expired. We are therefore removing all references to radiotelephone First, Second, Third Class Operator Licenses, and the Broadcast Endorsement.

3. Section 13.3(c)(1) is amended, paragraph (c)(2) is renumbered, and a new paragraph (c)(3) is added as follows:

§ 13.3 Holding of more than one commercial radio operator license

(c) * * * *

(1) One General Radio Operator License, one GMDSS Radio Operator License and one Restricted Radiotelephone Operator Permit; or

(2) One GMDSS Radio Operator License and one Restricted Radiotelephone Operator Permit; or

(3) One Marine Radio Operator Permit and one Restricted Radiotelephone Operator Permit.

4. Section 13.11 will be amended to include provisions regarding the new procedures to be followed in applying for a license.

§ 13.11 Application Filing Procedures

(c) Applicants for new licenses must first be examined by a Commission recognized testing entity and must receive a passing examination score from such an entity to be considered for a Commission license. Applicants must pay the required examination fee to the selected examining entity. Applicants failing an examination may reapply in accordance with the guidelines agreed upon by the Commission and the examining entity and must pay the regular examination fee.

(d) Licensees who fail to renew licenses with five-year terms before five years after expiration of the license must also be re-examined by a Commission recognized testing entity. Detailed information about application forms, examining organizations and filing procedures are contained in the bulletin "Commercial Radio Operator Licenses and Permits." This bulletin is available from the Commission's forms contractor or from the FCC, Washington, D.C. 20554.

(e) Applicants for new licenses must submit the appropriate license application fee and application forms specified by, and in accordance with Subpart G of Part 1 of this Chapter.

5. Section 13.12(b)(3) will be revised to read:

§ 13.12 (b)

(3) To satisfy the showing required in paragraph (b)(2) of this section, the applicant must submit documents signed by the ship station licensees, for example, the masters or commanding officers of U.S. ships, stating that the applicant performed the duties of a radio operator in a satisfactory manner under each of the conditions listed in paragraph (b)(2) of this section. Representatives of ship station licensees signing certifying statements must demonstrate direct knowledge of the nature of the applicant's service and the basis for concluding that the applicant has satisfied all requirements of Section 13.12(b)(2) of the Rules. Generally, only ship station officers, the master of the vessel or an officer with supervisory responsibilities over the applicant will be in a position to attest to the satisfactoriness of the applicant's service as a radio officer.

6. Section 13.21 will be revised as follows:

§ 13.21 Examination Requirement

(a) The Commission will grant licenses to qualified applicants who demonstrate knowledge of the Communications Act, Commission's Rules, and technical and operating requirements as evidenced by a passing score from a Commission-recognized testing entity. Written examinations will comprise questions from one or more of the following examination elements:

(1) Marine Radio Law and Operating Practice. Provisions of laws, treaties, regulations and radio operating procedures and practices the knowledge of which is necessary to communication by means of radiotelephone stations in the Maritime radio services.

(2) [Reserved]

* * * * *

(b) * * *

(c) Unless the Commission shall otherwise permit, an application will be returned to the applicant with a brief statement as to the omissions or discrepancies if:

(1) the application is defective with respect to completeness of answers to questions, informational showings, execution, or other matters of a formal character; or

(2) the application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

(d) While an application is pending, no subsequent inconsistent, conflicting or duplicative application may be filed by an applicant.

* * * * *

7. Section 13.22 will be amended to clarify the requirement that applicants must demonstrate a satisfactory knowledge of applicable Commission rules.

§ 13.22 Required Qualifications

(a) To be qualified to hold any commercial radio operator license, an applicant must have a satisfactory knowledge of the rules and must have the ability to correctly receive and transmit spoken messages in the English language.

(b) * * * *

(6) GMDSS Radio Operator's License. Written examinations covering elements 1 and 7.

(c) * * * *

8. Sections 13.23 will be deleted.

9. Section 13.24 will be revised as follows:

§ 13.24 Passing Score

(a) Applicants for a license requiring an examination must obtain a passing score from a Commission recognized testing entity and demonstrate satisfactory evidence of same to the Commission.

10. Section 13.25 will be amended to delete all references to First and Second Class Radiotelephone Operator Licenses, and the Radiotelephone Third Class Operator Permit. Issuance of these classes of licenses was discontinued in 1981. Paragraph (b) will be amended as follows:

§ 13.25 Examination procedures.

(a) * * *

(b) The holder of a valid General Radiotelephone Operator License, GMDSS Radio Operator License, or a Marine Radio Operator Permit will not be required to take the written examination covering examination element 1 when applying for a radiotelegraph operator's certificate.

* * * * *

11. Section 13.27 is deleted.

12. Section 13.61 would be amended to indicate a change which was effected through Commission Docket No. 83-322, but which was not included in Part 13 because of an oversight. A reference to Part 23 would be added to the list of affected Parts.

§ 13.61 Need for Licensed Commercial Operators

Rules which require Commission station licensees to employ licensed commercial radio operators to perform certain transmitter operating, maintenance, or repair duties are contained in Parts 23, 73, 74, 80 and 87 of this chapter.

* * * * *

13. Section 13.74 will be amended to add a new paragraph (d) to clarify posting requirements when licensees are required to send in the original license document as part of an application process.

§ 13.74 Posting Requirements for operator licenses

(a) * * *

(b) * * *

(c) * * *

(d) A licensee who is required to submit the actual license, rather than a photocopy, as part of an application process for another Commission license, or renewal of a license, must post a photocopy of the license with a copy of the application submitted.

* * * * *

FOOTNOTES

[1] Docket 86-397 (September 24, 1986), 51 Fed. Reg. 36415

[2] The Commission received comments from the following organizations and individuals: American Association of Community and Junior Colleges; California Maritime Academy; County of Los Angeles; J.G. Rountree, P.E., National Association of Business and Educational Radio; National Association of Radio and Telecommunications Engineers, Inc.; Radio Officers Union, District 3 of the National Marine Engineers Beneficial Association, AFL-CIO; Robert A. Jones, P.E.; and Society of Broadcast Engineers, Inc. The County of Los Angeles submitted the only Reply Comment filed in the docket. The majority of Commenters supported delegation of the examination functions to the private sector.

[3] Pursuant to the amendment, 47 U.S.C. §154(f)(5) states the following:

(A) The Commission, for purposes of preparing and administering any examination for a commercial radio operator license or endorsement, may accept and employ the services of persons that the Commission determines to be

qualified. Any person so employed may not receive compensation for such services, but may recover from examinees such fees as the Commission permits, considering such factors as public service and cost estimates submitted by such person.

(B) The Commission may prescribe regulations to select, oversee, sanction, and dismiss any person authorized under this paragraph to be employed by the Commission.

(C) Any person who provides services under this paragraph or who provides goods in connection with such services shall not, by reason of having provided such services or goods, be considered a Federal or special government employee.

[4] *Report and Order*, Gen. Docket 83-322, 96 FCC 2d 1123 (1984).

[5] Section 13.2 of the Rules, 47 C.F.R. §13.2, classifies operator licenses and endorsements as follows:

(a) Commercial radio operator licenses issued by the Commission are classified in accordance with the Radio Regulations of the International Telecommunications Union.

(b) The following licenses are issued by the Commission. International classification, if different from the license name, is given in parenthesis.

(1) First Class Radiotelegraph Operator's Certificate.

(2) Second Class Radiotelegraph Operator's Certificate.

(3) Third Class Radiotelegraph Operator's Certificate (radiotelegraph operator's special certificate).

(4) General Radiotelephone Operator License (radiotelephone operator's general certificate).

(5) Marine Radio Operator Permit (radiotelephone operator's restricted certificate).

(6) Restricted Radiotelephone Operator Permit (radiotelephone operator's restricted certificate).

(7) GMDSS Radio Operator's License (general radio operator's certificate).

(c) The following license endorsements are affixed by the Commission, to provide special authorizations or restrictions. Applicable licenses are given in parenthesis.

(1) Ship Radar endorsement (First and Second Class Radiotelegraph Operator's Certificates, General Radiotelephone Operator License).

(2) Six Months Service endorsement (First and Second Class Radiotelegraph Operator's Certificates).

(3) Restrictive endorsements; relating to physical handicaps, English language or literacy waivers, or other matters (all licenses).

[6] The GMDSS is an automated ship-to-shore distress alerting system using satellite and advanced terrestrial communications systems. GMDSS radio operators will be needed to operate this modern equipment which is to be phased in beginning in 1992 to 1999. *See Report and Order*, 7 FCC Rcd 951 (1992).

[7] The First, Second and Third Class Radiotelegraph Operator's Certificates, and the Marine Radio Operator Permit are currently issued for five-year terms. The General Radiotelephone Operator License and Restricted Radiotelephone Operator Permit (RP) are issued for the lifetime of the licensee. 47 C.F.R. §13.4. All licenses (except the RP) require the applicant to pass a written examination. The Ship Radar Endorsement also requires an examination. The Six-Months Service Endorsement does not require an examination, but applicants must meet eligibility criteria set forth in Section 13.12(b) of the Rules.

[8] The Commission intends to obtain approval for charging fees for the processing of the Six-Months Service Endorsement. That class of license was overlooked in the 1989 Budget Act. The Commission also expects to obtain approval to collect fees for applications for the new GMDSS radio operator license.

[9] Section 13.12(b)(3) states in pertinent part, that:

To satisfy the showing required in paragraph (b)(2) of this section, the applicant must submit documents signed by the ship station licensees, masters or commanding officers of U.S. ships stating that the applicant performed the duties of a radio operator in a satisfactory manner under each of the conditions listed in paragraph (b)(2) of this section.

[10] 47 C.F.R. §13.12(b)(3).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-315

In the Matter of

Amendment of Part 87 of the
Commission's Rules to
Establish Technical Standards
and Licensing Procedures for
Aircraft Earth Stations

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 20, 1992; Released: September 9, 1992

By the Commission:

I. INTRODUCTION

1. This Report and Order amends Part 87 of our Rules, 47 C.F.R. Part 87, to establish equipment technical standards and licensing procedures for aircraft earth stations (AES).[1] These amendments provide for the development of AES equipment for aeronautical public correspondence as well as safety related communications in mobile satellite operations. Previous Commission actions provided for the satellite and the ground earth station[2] portion of the Mobile-Satellite Service (MSS).[3]

II. BACKGROUND

2. On June 14, 1990, we adopted a *Notice of Proposed Rule Making* (*Notice*)[4] proposing to establish technical standards and licensing procedures for AESs. The basis for the *Notice* was laid in the L-band[5] Mobile-Satellite Service-Aeronautical Mobile-Satellite (Route) Service (MSS-AMS(R)S)[6] proceedings.[7] In the *Notice*, we proposed specific technical standards for radio frequency (RF) output power, modulation, bandwidth, emission limits, frequency stability, and emission types, and sought comment on whether other standards were necessary. We also proposed rules concerning licensing procedures. Additionally, we proposed to require interoperability between systems and priority and preemptive access to the L-band by AMS(R)S users (*see* Appendix B §§ 87.187(p) and 87.189(d)*infra*), consistent with footnote US308 to the Table of Frequency Allocations in Section 2.106 of our Rules, 47 C.F.R. § 2.106. Finally, we sought comment on whether we should include specific standards for receivers and interoperability and priority and preemptive access.

3. We proposed to establish AES standards in Part 87 of our Rules because the AMS(R)S is intended to provide domestic and international communication capability directly related to safety and regularity of flight. It is the only service afforded priority and preemptive access to the L-band.[8] Because AMS(R)S safety related communications and Aeronautical Mobile-Satellite Service (AMSS)[9] public correspondence services can be provided by the same station, we also proposed to include AMSS in Part 87. The Land Mobile-Satellite Service and the Maritime Mobile-Satellite Service parts of the L-band mobile-satellite system are licensed under Part 25 of our Rules, 47 C.F.R. Part 25.[10]

4. During this proceeding, the aeronautical industry has been developing standards for AESs. Special Committee 165 (SC 165) of RTCA, Inc. (RTCA)[11] has been working on the Minimum Operational Performance Standards for AMSS (AMSS MOPS or MOPS), the International Civil Aviation Organization's (ICAO) Aeronautical Mobile Communications Panel (AMCP) has been developing the

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[1] An AES is a mobile station in the Aeronautical Mobile-Satellite Service or the Aeronautical Mobile-Satellite (Route) Service located on board an aircraft. *Infra* notes 6, 9.

[2] A ground earth station is an earth station located at a fixed point on land to provide, among other functions, a feeder link for mobile-satellite operations.

[3] The Mobile-Satellite Service (MSS) refers to a generic satellite service that provides a radio communication service between mobile earth stations and one or more space stations. *See* 47 C.F.R. § 2.1. Examples of MSSs include the Aeronautical Mobile Satellite Service, the Land Mobile-Satellite Service, and the Maritime Mobile-Satellite Service.

[4] PR Docket No. 90-315, 5 FCC Rcd 3933 (1990).

[5] For the purposes of this proceeding, the term "L-band" refers to the bands 1545-1559 MHz and 1646.5-1660.5 MHz. The frequency band 1646.5-1660.5 MHz is the Earth (aircraft)-to-space portion of the allocation. The corresponding space-to-Earth allocation is 1545-1559 MHz.

[6] AMS(R)S is a mobile satellite service in which mobile earth stations are on board aircraft. Survival craft and emergency position-indicating radiobeacon stations may also participate in this service. *See* 47 C.F.R. § 2.1. This service can be used to provide communications to support domestic and international air traffic, including air traffic control. The (R) indicates that the spectrum is reserved for aeronautical communications flights related to the safety and regularity of flights primarily along national and international civil air routes. Formerly, we used the acronym AMSS(R) to refer to this service. In all other fora (*e.g.*, the International Civil Aviation Organization), AMS(R)S is used, so hereafter, we will also use AMS(R)S for consistency.

[7] An in-depth historical background to this proceeding is provided in the *Notice* at paras. 2-9.

[8] *See Second Report and Order* (*R&O*) in Gen. Docket No. 84-1234, 2 FCC Rcd 485 (1986), *recon. denied*, 4 FCC Rcd 6029 (1989); *Memorandum Opinion, Order and Authorization* (*MOO&A*) in Gen. Docket No. 84-1234, 4 FCC Rcd 6041 (1989), *remanded on other grounds, Aeronautical Radio, Inc. v. F.C.C.*, 928 F.2d 428 (D.C. Cir. 1991); *Tentative Decision*, 6 FCC Rcd 4900 (1991); *Final Decision on Remand*, 7 FCC Rcd 266 (1992).

[9] The Aeronautical Mobile-Satellite Service (AMSS) is a mobile-satellite service which, in general, includes communications such as public correspondence and airline administrative communications which are not related to safety or regularity of flight.

[10] *Supra* note 8.

[11] RTCA, Inc. (RTCA) was formerly the Radio Technical Commission for Aeronautics. Special Committee 165 (SC 165) is a public committee sponsored by the Federal Aviation Administration (FAA). The FAA has a special interest in the technical requirements of AMS(R)S radio equipment because of its effect on the safety and regularity of flight. Our rules recognize the

Standards and Recommended Practices (SARPs).[12] Aeronautical Radio, Inc.'s (ARINC) Airlines Electronic Engineering Committee (AEEC) continued development of its Characteristic 741 for Aviation Satellite Communication Systems (Characteristic 741), and Inmarsat continued development of its AES System Definition Manual (SDM).[13] These documents are all germane to this proceeding.

III. DISCUSSION

5. This rule making affects the MSS as it applies to aircraft operations in the L-band, *i.e.*, the AMSS and the AMS(R)S. Our primary objectives in this proceeding are to reduce interference potential among system users, satisfy international licensing requirements and to develop a basic framework for an interoperable aeronautical mobile-satellite service. The rules set forth in Appendix B are intended to promote the interests of safety and regularity of flight and of spectrum efficiency, while allowing flexibility of system design and variety in the services offered.

6. In response to the *Notice*, we received comments from eight private industry parties and two Federal agencies. Appendix A lists those parties. The commenters favor adopting technical standards for AES substantially as proposed.

7. In addition to addressing our specific proposals, many of the commenters urge us to expand the applicability of this rulemaking to encompass all L-band mobile-satellite users. These commenters contend that it would be difficult for us to address properly interoperability between radio services, and priority and preemptive access of AMS(R)S users if we did not concurrently adopt rules for all L-band users. Commenters who favor adopting receiver standards also indicate that it would be difficult to achieve interoperability and priority and preemptive access without them. They also argue that receiver standards must be adopted for all MSSs. We will address these broad issues first and then separately discuss the technical standards and licensing rules.

A. Interoperability and Priority and Preemptive Access

Expansion of the Applicability of this Rule Making

8. Several commenters request that we expand this rulemaking to include all Land Mobile-Satellite and Maritime Mobile-Satellite band mobile-satellite users in addition to AMS(R)S/AMSS (hereafter Aeronautical Services).[14] These commenters are concerned that non-Aeronautical Services users will not have the same degree of regulatory oversight as the Aeronautical Services users and that non-Aeronautical Services users, therefore, may cause harmful interference to safety communications and undermine the requirement for the priority and preemptive access of AMS(R)S safety-related communications. They reason that while aeronautical mobile-satellite service is regulated by the Federal Communications Commission (FCC) and the Federal Aviation Administration (FAA), and will be standardized by a number of instruments such as the MOPS and the SARPs, Land Mobile-Satellite and Maritime Mobile-Satellite users will receive little oversight. The commenters believe that only comparable FCC regulation of all Mobile-Satellite Services can ensure interoperability, facilitate the prevention of harmful interference to AMS(R)S communications, and allow for workable priority and preemptive access.

9. We conclude that we do not need to expand the applicability of this proceeding. These issues were addressed in the *Second Report and Order* in General Docket No. 84-1234[15] and in American Mobile Satellite Corporation's (AMSC) satellite system authorization.[16] As the sole licensee of an L-band satellite system in the U.S., AMSC is responsible for (1) overall design of the system[17] including incorporation of co-channel, adjacent channel, and adjacent beam interference protection; and (2) interoperability capability and priority and preemptive access for AMS(R)S users. All mobile terminal users -- other than those on aircraft -- will be included under a blanketlicense issued to AMSC or other service providers under Part 25 of our Rules, 47 C.F.R. Part 25.[18] AMSC and the service providers are, in turn, responsible to ensure that all transmitting units are capable of operating in accordance with the terms of their licenses.[19] Therefore, the Commission sufficiently regulates all L-band users -- the Aeronautical Services under Part 87, and the remainder of the MSS under Part 25 and AMSC's authorization.

Technical Standards for Interoperability and Priority and Preemptive Access

10. In our decision authorizing AMSC's satellite system, we required AMSC to design its mobile-satellite system to be interoperable with other L-band MSS systems (*e.g.*, Canada's and Inmarsat's).[20] Our objectives were to allow aeronautical mobilesatellite (R) communications traffic to be handed-off between systems and to maintain the integrity of AMS(R)S communications internationally and domestically.[21]

FAA's interest and responsibility by explicitly providing for FAA comment in our aviation radio equipment type-acceptance procedures. *See* 47 C.F.R. § 87.147(c). Special Committee 165's draft Minimum Operational Performance Standards for the Aeronautical Mobile-Satellite Service was a primary source upon which we based the technical proposals in the *Notice*. *See Notice* at para. 12. Most of the commenters to the *Notice* also participate in SC 165.

12 ICAO is an international body operating under the auspices of the United Nations. When ICAO adopts the SARPs, it is binding upon the ICAO contracting States and becomes an international standard. Many of the commenters participated in developing the SARPs.

13 Inmarsat (formerly the International Maritime Satellite Organization) is an international organization which provides worldwide mobile satellite communications. The AES SDM is based upon similar SDMs that Inmarsat is using for its existing maritime mobile-satellite systems. Inmarsat also participated in the development of MOPS and SARPS.

14 Comments of Rockwell, ARINC/ATA, AvCom, COMSAT, and AOPA. Reply comments of Rockwell, AvCom, and NTIA.

15 *See R&O* at 489.

16 *See MOO&A* at 6048-6049, 6054-6056.

17 *See MOO&A* at 6055.

18 AMSC may provide service or other vendors may provide service via feeder links which operate through AMSC's gateway station or feeder links belonging to the vendor. *See R&O* at 489.

19 *See R&O* at 489.

20 *See MOO&A* at 6055.

21 *Id.*

11. In the *Notice*,[22] we proposed a general requirement for interoperability and for priority and preemptive access for AMS(R)S communications in the L-band. We also provided for the priority of AMS(R)S communications over public correspondence.[23] Further, we asked commenters to identify any characteristics of AES design which we should prescribe in our rules to meet the stated objectives.

12. AMSC and Communications Satellite Corporation (COMSAT) both oppose incorporation of specific standards for interoperability and priority and preemptive access in the rules at this time.[24] They indicate that these matters should be left to the industry. AMSC states, "AMSC is required by its license to incorporate into the overall system design whatever minimum requirements are necessary to enable the U.S. AMS(R)S system to be interoperable with other AMS(R)S systems, and to provide priority and preemptive access for AMS(R)S communications."[25] In short, they argue that specific standards for interoperability and priority and preemptive access in our rules are unnecessary. The FAA and the National Telecommunications and Information Administration (NTIA) are in favor of adding standards for interoperability and priority and preemptive access into our rules. Each recommends that we initiate a separate rulemaking to establish such standards.[26] The FAA and NTIA, however, do not propose specific standards for interoperability or priority and preemptive access.

13. We are not persuaded that specific standards are necessary at this time. For the same reasons discussed above in paragraph 9, we believe that a separate proceeding is unnecessary to address specific standards at this time. Therefore, we are adopting rules requiring interoperability and priority and preemptive access for AMS(R)S as proposed in the *Notice*. We decline to adopt specific standards, however.

14. British Telecommunications, plc (BT) recommends that the Commission should, at a minimum, adopt standards ensuring interoperability between AMSC's satellite system and that of Inmarsat, require that AES equipment meet the technical requirements of Characteristic 741, and enforce applicable recommendations of the International Telephone and Telegraph Consultative Committee (CCITT).[27] "Interoperability" in the context of this proceeding directly refers to intersystem operation between various L-band satellite systems. The technical aspects of our rules generally fall within the ARINC Characteristic 741 requirements. Further, ARINC standards are generally followed by all U.S. aeronautical equipment manufacturers. It is to the service provider's benefit to follow the CCITT Recommendations, especially considering the international nature of the communications involved, and we have no reason to believe that these Recommendations will not be followed. We will monitor the development of this service and, if the need for additional regulation arises, we will take appropriate action at that time.

15. Some of the commenters raise issues that are related to interoperability and priority and preemptive access but do not concern standards. For example, ARINC/ATA and Honeywell, Inc. (Honeywell) express concern regarding the requirement for continuous watch on the frequencies used for flight safety and regularity during public correspondence communications.[28] They contend that the continuous watch requirement is satisfied by compliance with the priority and preemptive access requirements proposed in the *Notice* and recommend that we make this clear in the rules. We agree with ARINC/ATA and Honeywell that the continuous watch requirement is satisfied -- in the L-band only - by compliance with our priority and preemptive access requirements.[29] We will revise Section 87.189(c) accordingly. Continuous watches that are required in other bands are not affected by this change. ARINC/ATA and Honeywell also recommend that we remove the reference to "route" from the rule we proposed in the *Notice* to provide that AMS(R)S communications have priority over public correspondence. They contend that this would ensure priority protection in all AMSS communications over public correspondence rather than just en route communications.[30] We do not agree with ARINC/ATA and Honeywell that all AMSS communications must have priority over public correspondence. AMSS includes, among other types of communications, public correspondence, airline administrative messages, and safety and regularity of flight communications.

Receiver Standards

16. In the *Notice*, we did not propose to include receiver technical standards in our rules. Because of the potential contribution of receivers in enhancing the efficient use of spectrum by all MSS users and to minimizing interference, however, we asked for comments on this subject. We asked which, if any, receiver standards should be adopted -- including specific parameters, with a discussion of any benefits that might accrue from adopting them. Commenters were also asked to propose measurement procedures for these parameters that could be used to determine compliance.

17. Rockwell, ARINC/ATA, AMSC, AvCom, Inc. (AvCom), The Aircraft Owners and Pilots Association (AOPA), and COMSAT oppose adding receiver standards to our rules as simply unnecessary. The FAA and NTIA favor adding receiver standards. They assert that, to enable the system to achieve interoperability and establish a priority and preemptive access regime, the ground earth station, as the control center for the entire system, can only control the AESs through their receivers -- the AES can only respond to a command it receives. NTIA recommends that we establish minimum receiver susceptibility standards.[31]

18. There are guidelines set forth in other fora (*e.g.*, SC 165 and AMCP) that should adequately standardize receiver characteristics throughout the industry. As stated above in paragraph 9, AMSC's authorization requires it to

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[22] *See Notice*, Appendix, § 87.187(p).
[23] *See Notice*, Appendix, § 87.189(d).
[24] *See* AMSC comments at 3, and COMSAT comments at 1.
[25] AMSC Comments at 2.
[26] *See* FAA reply comments at 2, and NTIA reply comments at 5.
[27] *See* BT comments at 4.
[28] *See* 47 C.F.R. § 87.189(b).
[29] Communications through the satellite system are automatically routed to a specific terminal. As a result, the pilot in command or other appropriate person on the aircraft will be notified of an incoming priority communication just as if a watch was being maintained on a dedicated frequency.
[30] *See* ARINC/ATA comments at 14, and Honeywell comments at 5.
[31] NTIA recommends that we consider standards for receiver

design the system to ensure interoperability and priority and preemptive access capability. AMSC must require adequate receiver characteristics in its commissioning process to ensure interoperability and priority and preemptive access. The FAA and NTIA have not recommended specific parameters or methods of measurement which would ensure compliance with receiver standards, nor have they made compelling arguments in favor of receiver standards. Therefore, we are not adopting receiver standards at this time.

B. Transmitter Technical Standards

19. We proposed six technical standards to reduce interference potential between users to develop a basic framework for interoperable Aeronautical Mobile-Satellite (R) Services, and to assure the safety and regularity of flight. We proposed technical standards for RF output power, modulation, bandwidth, emission limits, frequency stability, and several emission types. Finally, we sought comment on whether other transmitter standards are necessary.[32] Our proposals for RF output power, bandwidth, and emission types were supported without change and, therefore, we are adopting them. A discussion of the other proposed standards follows.

Modulation

20. We proposed to add a new paragraph (j) under Section 87.141, 47 C.F.R. § 87.141, modulation requirements, to specify use of Binary Phase Shift Keying (BPSK) and Quaternary Phase Shift Keying (QPSK) modulations for AESs. These modulations are based on the work of SC 165 and AMCP. We also proposed that other modulation techniques be allowed upon a showing of need.

21. Rockwell and COMSAT recommend changing BPSK and QPSK to aviation-BPSK (A-BPSK) and aviation-QPSK (A-QPSK), respectively. They also suggest definitions of A-BPSK and A-QPSK to be added to our rules.[33] AMSC contends that we should adopt the rule as it was proposed in the *Notice*, "in order to retain flexibility in selecting modulation techniques...."[34] ARINC/ATA argue that the "proposed rules [are] clearly flexible enough to accommodate aviation-specific modulation methods...."[35] No commenters recommend types of modulation in addition to those discussed above. Those commenting on this issue indicate that it would be satisfactory to consider other modulation types upon a showing of need. Provisions for this showing of need set forth at Section 87.137(d) of our Rules, 47 C.F.R. § 87.137(d), so we will not repeat them under Section 87.141(j).

22. We agree with AMSC and ARINC/ATA that specifying aviation phase shift keying will remove flexibility from the rules. Indeed, A-BPSK is a subset of BPSK, and A-QPSK is a subset of QPSK. Therefore, A-BPSK and A-QPSK are permitted under the rules we are adopting. We decline to limit flexibility in modulation technology by substituting the narrower terms as requested by Rockwell and COMSAT.

Emission Limits

23. We proposed to add separate emission limits for BPSK modulation and QPSK modulation. Different limits for BPSK and QPSK reflect the different interference levels to which these emissions are subject. These emission limits include attenuation of noise output, intermodulation products, and attenuation of out-of-band emissions with respect to rates of data transmission.

24. Several commenters suggest changes to the formulae, tables, and terminology in our proposals for emission limits. The changes they recommend were intended to bring the formulae into conformance with the SC 165 Minimum Operational Performance Standards for the AMSS (MOPS) and to improve the accuracy of terms. We have changed the emission limit rules to conform to the MOPS which takes into account the concerns of the commenters.[36] With these changes, our rules and the relevant sections of the MOPS, AMCP Standards and Recommended Practices (SARPs) and the Inmarsat System Definition Manual for AES (SDM)[37] are consistent.

Frequency Stability (Tolerance)

25. We proposed a frequency tolerance of 0.2 parts per million (ppm). As stated in the *Notice*, this value is more strict than the international requirement for AES equipment in the 1645.5-1660.5 MHz band. Our intention in proposing 0.2 ppm was to promote spectrum efficiency by requiring a system tolerance which maintains compatibility with the RTCA-established minimum channel spacing of 2.5 kHz.

26. Most of the commenters addressing this issue[38] agree with 0.2 ppm, at least as a compromise value.[39] MOPS and SARPs do not specify 0.2 ppm. They specify the value of +/- 320 Hz for system tolerance. COMSAT recommends +/- 320 Hz for the system tolerance based on values included in the SDM.[40] At the highest frequency in 1646.5-1660.5 MHz band, a 0.2 ppm tolerance is +/- 332.1 Hz - a difference of only 12.1 Hz from that required by MOPS and SARPs. We are adopting +/- 320 Hz because it

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sensitivity, receiver desensitization, image and spurious response rejection, rejection of signals outside the AES receive band, and adjacent channel rejection. NTIA made no specific recommendations of values. NTIA reply comments at 10.

[32] Rockwell International Corporation (Rockwell) expresses concern that our proposed type-acceptance rules do not account for modular designs. Rockwell, in its comments at 2, states that "Industry standard ARINC Characteristic 741 allows for modularity and interchangeability of major subsystems of the AES. Manufacturers who produce only subsystems will not be able to type accept the subsystem as individually the subsystem may not meet relevant standards of Part 87 until assembled with other manufacturers' subsystems that make up the complete system. Type acceptance will be required for each possible system combination." Type acceptance, however, may not be required for each subsystem configuration as described by Rockwell because type acceptance of certain major subsystems with common interfaces may be possible. This issue will be addressed at the time of type acceptance on a case-by-case basis.

[33] The respective definitions proposed by Rockwell and COMSAT were identical.

[34] AMSC reply comments at n.1.

[35] ARINC/ATA reply comments at 7.

[36] Appendix B, § 87.139(h)(4), *infra*.

[37] *Supra* notes 8,10,11, 12.

[38] Rockwell, ARINC/ATA, AMSC, COMSAT, and Honeywell.

[39] This was a point of disagreement among several commenters whose recommendations varied between 0.1 and 0.5 ppm. All of these commenters changed their recommendations to 0.2 ppm in reply comments.

[40] *See* COMSAT reply comments at 2.

is adequate for its purpose, it conforms to the value in MOPS and SARPs, it does not vary significantly from 0.2 ppm, and is simpler to administer.

27. All commenters who addressed this issue recommend changes to the footnote on the tolerance which requires the measurement to be made exclusive of Doppler effect and specifies a 0.1 ppm tolerance on the AES transmitter oscillator for type acceptance.[41] The commenters generally disagree with a separate tolerance for transmitter type acceptance but agree with the *Notice* that the measurement should be made without Doppler effect compensation. AMSC disagrees with the *Notice* and the other commenters, arguing that Doppler compensation should be included in the tolerance measurement because the frequency transmitted by the AES may not be Doppler compensated or may be overcompensated with respect to other satellites. The *Notice* has no reference to Doppler effect outside of this footnote. We will discuss Doppler effect as it relates to measurement of frequency stability at para. 28, below, and the separate issue of a requirement for Doppler effect compensation at paragraphs 29-30, below.

28. We are clarifying in the Rules that +/- 320 Hz represents a bench test measurement. The measurement of this value appears to have been a point of confusion -- we did not intend for this measurement to be made from a flying aircraft. Therefore, the issue of Doppler compensation is irrelevant to this discussion of frequency stability. The commenters made no compelling arguments against using the AES transmitter oscillator tolerance in type acceptance. The value we are adopting is based on information from the MOPS and the SDM and is currently considered by the industry to be a reasonable value. We have clarified the Rules to indicate that this figure represents a bench test measurement.

Additional Technical Standards

29. We requested comments on other technical standards that may be needed for transmitters. The only additional topic raised was Doppler compensation. ARINC/ATA and Honeywell recommend that we add a requirement for Doppler compensation into the rules. They believe that this need is evident due to the high aircraft speeds involved. Rockwell opposes a requirement for Doppler compensation. Rockwell contends that in future high-data rate systems, Doppler shift will be negligible compared to bandwidth.[42] In that case, our requirement for compensation would be overly restrictive.

30. We agree with ARINC/ATA and Honeywell that AESs should compensate for Doppler effect. The maximum theoretical Doppler shift is large enough that the AES could cause adjacent channel interference and could have problems acquiring and maintaining a channel connection (and channel separation) through the satellite.[43] This type of problem could become critical if the connection failure were to occur during a safety related transmission. Therefore, we will add a new paragraph (e) to Section 87.145 of the Rules, 47 C.F.R. § 87.145, to require Doppler effect compensation. The value we have selected is taken from the MOPS.[44]

C. Licensing Rules

31. BT and ARINC/ATA point out that in accordance with the *Convention of International and Civil Aviation*, effective 4/4/47, Article 30, aircraft of foreign registry are not required to obtain a license from a country over which they fly -- in this case, the U.S. -- if they have a license from the country of registry. They recommend that Sections 87.51(a) and (b) of our Rules, 47 C.F.R. §§ 87.51(a) and (b), be amended by adding "except as provided in Section 87.191." Sections 87.51(a) and (b) provide specifically for commissioning of U.S. flag aircraft earth stations. Section 87.191 of our Rules, 47 C.F.R. § 87.191, provides for operation of foreign aircraft in U.S. airspace. These rules are clearly distinct in their focus -- it is not necessary to refer to foreign aircraft under rules for domestic aircraft.

IV. CONCLUSION

32. We believe that the foregoing standards meet our primary objectives of reducing interference potential among system users and providing a basic framework for an interoperable Aeronautical Mobile-Satellite (R) Service at 1646.5-1660.5 MHz band. These standards will promote the new mobile aircraft earth station industry and add a new dimension to safety in flight.

V. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), that Part 87 of the Commission's Rules IS AMENDED as set forth in the attached Appendix B, effective **[30 days after FR publication].**

34. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

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[41] System tolerance is the sum of the receiver tolerance and the transmitter tolerance which in practice are cumulative. The receiver and the transmitter each account for approximately one-half, or +/-160 Hz, of the tolerance the system requires.

[42] Necessary bandwidth is proportional to data rate of transmission. Rockwell indicates that in future systems which may use high data rates, the necessary bandwidth will be large enough that the doppler shift will be insignificant by comparison. While doppler shift may not have much effect on the accuracy of data transmitted under those circumstances, it will always affect accuracy of the carrier frequency with respect to the receiver. This, in turn, directly affects whether a transmission channel can be established and maintained. Doppler effect that is large enough, therefore, can cause transmission problems regardless of bandwidth.

[43] In developing MOPS, the industry has agreed that Doppler shift is equal to approximately 2.6 Hz multiplied by airspeed in knots multiplied by the cosine of the elevation angle of the AES transmitter with respect to the satellite. Doppler effect is most pronounced at the satellite's coverage horizon where the elevation angle is 0^0 (and cosine $0^0 = 1$). Then using, for example, an airspeed of 600 kts. at the horizon, the Doppler shift would be 1560 Hz.

[44] We are specifying that the accuracy of the transmitted signal be within +/- 335 Hz from the nominal frequency. This is intended to be a bench test figure which assumes zero error for the received ground earth station signal and includes the AES frequency reference error and the AES automatic frequency control residual errors.

35. For further information, contact: Marcus Wolf, RM 5114A, Private Radio Bureau, Federal Communications Commission, 1919 M ST, NW, Washington, DC 20554; telephone 202-632-7197.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties filing comments:

1. Aeronautical Radio, Inc., and The Air Transport Association of America (ARINC/ATA)
2. Aircraft Owners and Pilots Association (AOPA)*
3. American Mobile-satellite Corporation (AMSC)
4. AvCom, Inc. (AvCom)
5. British Telecommunications, plc (BT)
6. Communications Satellite Corporation (COMSAT)
7. Federal Aviation Administration (FAA)
8. Honeywell, Inc. (Commercial Flight Systems Group) (Honeywell)
9. Rockwell International Corporation (Rockwell)

Parties filing reply comments:

1. ARINC/ATA
2. AMSC
3. AvCom
4. COMSAT
5. FAA
6. Honeywell*
7. National Telecommunications and Information Administration (NTIA)
8. Rockwell

* Filing was late; however, all filings were considered.

APPENDIX B

Part 87 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 87 continues to read:

Authority: 48 Stat 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301, 609.

2. Section 87.5 is amended by adding definitions in alphabetical order to read as follows:

§ 87.5 Definitions.

* * * * *

Aeronautical Mobile-Satellite Service. A mobile-satellite service in which mobile earth stations are located on board aircraft.

* * * * *

Aircraft earth station (AES). A mobile earth station in the aeronautical mobile-satellite service located on board an aircraft.

* * * * *

3. A new Section 87.51 is added under Subpart B to read as follows:

§ 87.51 Aircraft earth station commissioning.

(a) Aircraft earth stations which require commissioning to use a privately owned satellite system must submit FCC Form 404 to the Commission before transmitting on any satellite frequency bands allocated for aeronautical mobile-satellite communications.

(b) Aircraft earth stations authorized to operate in the Inmarsat space segment must display the Commission license together with the commissioning certificate issued by Inmarsat. Notwithstanding the requirements of this paragraph, aircraft earth stations may operate in the Inmarsat space segment without an Inmarsat-issued commissioning certificate if written approval is obtained from Inmarsat in addition to the license from the Commission.

4. In Section 87.131, the table is revised by adding a new entry "Aircraft Earth" under the heading "Class of station" at the end of the table, and by adding a new footnote 8 to read as follows:

§ 87.131 Power and emissions.

* * * * *

Class of station	Frequency band/ frequency	Authorized emission(s)	Maximum power[1]
* * * * *			
(Radionavigation)..	* * *	* * *	* * *
Aircraft Earth	UHF	G1D, G1E, G1W	60 watts[8].

* * * * *

[8] Power may not exceed 60 watts per carrier. The maximum EIRP may not exceed 2000 watts per carrier.

5. Section 87.133(a) is amended at (7) by adding a new entry, "Aircraft earth station", between the listings for "Aircraft stations" and "Radionavigation stations," and a new footnote 11 to read as follows:

§ 87.133 Frequency stability.

(a) * * *

Frequency band (lower limit exclusive, upper limit inclusive), and categories of stations	Tolerance[1]	Tolerance[2]

* * * * *

(7) Band-470 to 2450 MHz:

* * * * *

Aircraft stations	* * *	* * *
Aircraft earth station	---	320 Hz[11]
Radionavigation stations:		

* * * * *

[11] For purposes of type acceptance, a tolerance of 160 Hz applies to the reference oscillator of the AES transmitter. This is a bench test.

6. In Section 87.137(a), the table is amended by adding new entries, "G1D," G1E," and "G1W" between the existing entries "F9D" and "G3E[6]", and by adding a new Footnote 16 to read as follows:

§ 87.137(a) Types of emission.

(a) * * *

		Authorized bandwidth (kiloHertz)		
Class of emission	Emission designator	Below 50 MHz	Above 50 MHz	Frequency deviation

* * * * *

F9D	***	***	***	***
G1D16	21K0G1D		25	
G1E16	21K0G1E		25	
G1W16	21K0G1W		25	
G3E6	***	***	***	***

* * * * * *

[16] Authorized for use by aircraft earth stations. Lower values of necessary and authorized bandwidth are permitted.

7. In Section 87.139, a new paragraph (i) is added to read as follows:

§ 87.139 Emission limitations.

* * * * *

(i) When using G1D, G1E, or G1W emissions in the 1646.5-1660.5 MHz frequency band, the emissions must be attenuated as shown below.

(1) At rated output power, while transmitting a modulated single carrier, the composite spurious and noise output shall be attenuated below the mean power of the transmitter, pY, by at least:

Frequency (MHz)	Attenuation (dB)*
.005 - 1559	83 or 65 + $10\log_{10}$pY, whichever is greater
1559 - 18000	55 or 37 + $10\log_{10}$pY**, whichever is greater

* These values are expressed in dB below the carrier referenced to a 4 kHz bandwidth and relative to the maximum emission envelope level.

** Excluding the frequency band of +/-35 kHz or +/-4.00 x the symbol rate (SR), about the carrier frequency, whichever is the greater exclusion.

(2) For transmitters rated at 60 watts or less:

When transmitting two unmodulated carriers, each 3 dB below the rated power, the mean power of any intermodulation products must be at least 24 dB below the mean power of either carrier.

(3) The transmitter emission limit is a function of the modulation type and symbol rate (SR). Symbol Rate is expressed in symbols per second.

(4) While transmitting a single modulated signal at the rated output power of the transmitter, the emissions must be attenuated below the maximum emission level by at least:

Frequency Offset (normalized to SR)	Attenuation (dB)
+/- 0.75 x SR	0
+/- 1.40 x SR	20
+/- 2.80 x SR	40
+/- 4.00 x SR or +/- 35 kHz whichever is greater	F_m

Where: F_m = 55 or (37 + $10\log_{10}$pY), whichever is greater

SR = Symbol Rate

SR = 1 x channel rate for BPSK

SR = 0.5 x channel rate for QPSK

8. In Section 87.141, a new paragraph (j) is added to read as follows:

§ 87.141 Modulation requirements.

* * * * *

(j) Transmitters used at Aircraft earth stations must employ BPSK for transmission rates up to and including 2400 bits per second, and QPSK for higher rates.

9. In Section 87.145, paragraph (b) is revised and a new paragraph (e) is added to read as follows:

§ 87.145 Acceptability of transmitters for licensing.

* * * * *

(b) Each transmitter must be type accepted for use in these services, except as listed in paragraph (d) of this section. However, aircraft stations which transmit on maritime mobile frequencies must use transmitters authorized for use in ship stations in accordance with Part 80 of this Chapter.

* * * * *

(e) Aircraft earth stations must correct their transmit frequencies for Doppler effect relative to the satellite. The transmitted signal may not deviate more than 335 Hz from the desired transmit frequency. (This is a root sum square error which assumes zero error for the received ground earth station signal and includes the AES transmit/receive frequency reference error and the AES automatic frequency control residual errors.) The applicant must attest that the equipment provides adequate Doppler effect compensation and where applicable, that measurements have been made that demonstrate compliance. Submission of data demonstrating compliance is not required unless requested by the Commission.

10. In Section 87.147, paragraph (d)(3) is revised to read as follows:

§ 87.147 Type acceptance of equipment.

* * * * *

(d) * * *

(3) The frequency bands are as follows:

74.800 MHz to 75.200 MHz
108.000 MHz to 137.000 MHz
328.600 MHz to 335.400 MHz
960.000 MHz to 1215.000 MHz
1559.000 to 1626.500 MHz
1646.500 MHz to 1660.500 MHz
5000.000 MHz to 5250.000 MHz
14.000 GHz to 14.400 GHz
15.400 GHz to 15.700 GHz
24.250 GHz to 25.250 GHz
31.800 GHz to 33.400 GHz

* * * * *

11. In Section 87.171, the following symbol and class of station are added, in alphabetical order, "TJ - Aircraft earth station in the Aeronautical Mobile-Satellite Service."

12. In Section 87.173, the frequency table in paragraph (b) is amended by adding the frequency band 1646.5-1660.5 MHz, to read as follows:

§ 87.173 Frequencies.

* * * * *

(b) Frequency table:

Frequency or frequency band	Subpart	Class of Station	Remarks
* * *	* * *	* * *	* * *
1646.5-1660.5 MHz	F	TJ	Aeronautical Mobile-Satellite (R)

* * * * *

13. In Section 87.185, paragraphs (b) and (c) are revised and new paragraph (d) is added to read as follows:

§ 87.185 Scope of service.

* * * * *

(b) Aircraft public correspondence service must be made available to all persons without discrimination and on reasonable demand, and must communicate without discrimination with any public coast station or mobile-satellite earth station authorized to provide aircraft public correspondence service.

(c) Aircraft public correspondence service on maritime mobile frequencies may only be carried by aircraft stations licensed to use maritime mobile frequencies and must follow the rules for public correspondence in Part 80.

(d) Aircraft public correspondence service on Aeronautical Mobile-Satellite (R) Service frequencies may only be carried on aircraft earth stations licensed to use Aeronautical Mobile-Satellite (R) frequencies and are subject to the rules for public correspondence in this Part. Aircraft public correspondence service on Maritime Mobile-Satellite Service frequencies may only be carried by aircraft earth stations licensed to use Maritime Mobile-Satellite frequencies and are subject to the rules for public correspondence in Part 80.

14. Section 87.187 is amended by redesignating paragraphs (p) through (aa) as paragraphs (q) through (bb), and adding a new paragraph (p) to read as follows:

§ 87.187 Frequencies.

* * * * *

(p) The frequencies in the band 1545.000-1559.000 MHz and 1646.500-1660.500 MHz are authorized for use by the Aeronautical Mobile-Satellite (R) Service. The use of the bands 1544.000-1545.000 MHz (space-to-Earth) and 1645.500-1646.500 MHz (Earth-to-space) by the Mobile-Satellite Service is limited to distress and safety operations.

In the frequency bands 1549.500-1558.500 MHz and 1651.000-1660.000 MHz, the Aeronautical Mobile-Satellite (R) requirements that cannot be accommodated in the 1545.000-1549.500 MHz, 1558.500-1559.000 MHz, 1646.500-1651.000 MHz, and 1660.000-1660.500 MHz bands shall have priority access with real-time preemptive capability for communications in the Mobile-Satellite service. Systems not interoperable with the Aeronautical Mobile-Satellite (R) Service shall operate on a secondary basis. Account shall be taken of the priority of safety-related communications in the Mobile-Satellite Service.

* * * * *

15. Section 87.189 is amended by revising paragraph (a), redesignating paragraphs (b) through (d) as paragraphs (c) through (e), adding a new paragraph (b), and revising redesignated paragraphs (c) and (d) to read as follows:

§ 87.189 Requirements for public correspondence equipment and operations.

(a) Transmitters used for public correspondence by aircraft stations in the maritime mobile frequency bands must be authorized by the Commission in conformity with Part 80 of this Chapter.

(b) Transmitters used for public correspondence by aircraft stations in the Aeronautical Mobile-Satellite (R) or Maritime Mobile-Satellite frequencies must be type-accepted by the Commission in conformity with Part 87. Aircraft earth stations that are required to be commissioned to use a privately owned satellite system also must meet the provisions of § 87.51.

(c) A continuous watch must be maintained on the frequencies used for safety and regularity of flight while public correspondence communications are being handled. For aircraft earth stations, this requirement is satisfied by compliance with the priority and preemptive access requirements of § 87.187(p).

(d) All communications in the Aeronautical Mobile Service and the Aeronautical Mobile-Satellite (R) Service have priority over public correspondence.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-415

In re Applications of

CREATIVE BROADCASTERS, INC.	File No. BPH-880630MI
LARRY E. SNYDER t/a DON KELLY RADIO	File No. BPH-880630MX
NEW PALTZ BROADCASTING, INC.	File No. BPH-880630NS

For Construction Permit for a
New FM Station on Channel 227A
in New Paltz, New York

Appearances

Stuart A. Shorenstein, Esquire, and *Charles S. Biener, Esquire*, on behalf of Creative Broadcasters, Inc.; *Lauren A. Colby, Esquire*, on behalf of Larry E. Snyder t/a Don Kelly Radio; and *A. Wray Fitch III, Esquire*, on behalf of New Paltz Broadcasting, Inc.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: September 1, 1992; Released: September 8, 1992

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 5 FCC Rcd 5720 (1990) ("*HDO*"), the Assistant Chief, Audio Services Division, designated for consolidated hearing the mutually exclusive applications of Creative Broadcasters, Inc. ("Creative"), Larry E. Snyder t/a Don Kelly Radio ("Snyder"), and New Paltz Broadcasting, Inc. ("NPB"), for a construction permit for a new FM Station on Channel 227A in New Paltz, New York.[1] In addition to the standard comparative issues (Issues 2 and 3), the *HDO* specified an issue to determine whether Creative and NPB had reasonable assurance of the availability of their proposed transmitter sites (Issue 1). By *Memorandum Opinion and Order*, FCC 91M-1358, released April 18, 1991, Issue 1 was resolved by summary decision in favor of Creative and NPB.

2. By *Memorandum Opinion and Order and Notice of Apparent Liability For Forfeiture*, FCC 92M-147, released February 3, 1992 ("*MO&O*"), the following issues were added against NPB:

> 7. To determine the role, if any, of William H. Walker, Jr., in the prosecution of the application of New Paltz Broadcasting, Inc.
>
> 8. To determine, in light of the evidence adduced under Issue 7, whether Betty L. Walker misrepresented facts and/or lacked candor in her testimony in this proceeding and/or in her declarations under penalty of perjury dated October 24, 1991, and January 10, 1992.
>
> 9. To determine, in light of the evidence adduced under Issues 7 and 8, whether New Paltz Broadcasting, Inc., is basically qualified to become a Commission licensee.

These issues were added because affidavits and declarations submitted by Richard and Susan Peplow, on the one hand, and William H. and Betty L. Walker, on the other hand, contained contradictory versions of certain events. The contradictions pertained to the alleged participation of Mr. Walker in a series of meetings with the Peplows, and the possible attribution of Mr. Walker's broadcast interests to NPB under the diversification criterion of the standard comparative issue.[2] The contradictions also raised questions about the truthfulness of Mrs. Walker's testimony and declarations in this proceeding. (*MO&O*, at para. 4.) The burden of proceeding on these issues was assigned to Snyder and the burden of proof was assigned to NPB. (*Id.*, at p. 3.)

3. A prehearing conference was held on December 4, 1990. Hearings were held in Washington, D.C., on April 29 and 30, 1991, April 21, 22, 23, 24, 27, 28 and 29, 1992, and May 20, 1992. During the course of the May 20, 1992, hearing session, the applicants announced that a complete settlement of this proceeding had been reached. (Tr. 1879.) Procedural dates for the submission of the formal settlement papers were set and the hearing was suspended. *See Order*, FCC 92M-595, released May 22, 1992. NPB was given permission to file a motion for summary decision of Issues 7 through 9. (*Id.*; Tr. 1881.)

4. Under consideration are a Joint Request for Approval of Settlement Agreements, filed on July 6, 1992, by NPB, Creative, and Snyder; a Contingent Petition for Leave to Amend, filed on July 10, 1992, by NPB; a Motion for Summary Decision and Findings of Fact and Conclusions of Law on Issues 7, 8 and 9, filed on July 24, 1992, by NPB;[3] a Supplement to Joint Request for Approval of Settlement Agreement, filed on August 6, 1992, by NPB; and Mass Media Bureau's Comments on Settlement Agreements and Interrelated Motion for Summary Decision, filed on August 7, 1992, by the Mass Media Bureau ("Bureau").

MOTION FOR SUMMARY DECISION

5. NPB seeks post-hearing[4] summary decision in its favor of Issues 7, 8 and 9. The Bureau supports NPB's motion. Although it is a close question, for the reasons which follow, favorable resolution of these issues is warranted.

6. The controversy surrounding the Walkers and Peplows revolves around major discrepancies in their respective versions of what occurred at three meetings in April 1991. Essentially, the Peplows claimed that Mr. Walker participated in these meetings in a substantive manner (Snyder Exs. 18-20), whereas the Walkers contended that he did not (NPB Exs. 7-12). The meetings related to the question of whether anyone had approached Mr. Peplow about the sale of certain land he owned for

use as a transmitter site by Snyder, and attempts to get Mr. Peplow to sign a declaration under penalty of perjury. At the first meeting, when asked whether he had been approached, Mr. Peplow responded in the negative, although he had been contacted by a real estate agent in 1988, had been informed at that time that someone was interested in purchasing his land for a transmitter site, and told the agent he would sell his land for $160,000. At the second meeting, which occurred on the following evening in the Peplow's home, Mr. Peplow was asked to sign a declaration stating that neither he nor his wife had been approached by anyone seeking to lease or purchase his land for use as a transmitter site. Mr. Peplow refused to sign the declaration. On the next day, a third meeting took place between Mr. Walker and Mr. Peplow at an auto repair shop. Mr. Walker claimed he was merely delivering a copy of Snyder's engineering proposal to Mr. Peplow at Mr. Peplow's request, whereas Mr. Peplow contended that Mr. Walker did not give him the engineering but tried to persuade him to sign the declaration.

7. After a careful evaluation of the evidence of record, it must be concluded that the Walkers' recollections of the events in question were more reliable and entitled to more weight than the recollections of the Peplows. This is so because the Peplows' affidavits, deposition testimony, and hearing testimony contain numerous material conflicts and inconsistencies, as well as a lack of specificity, which on balance does not inspire confidence in their memories.[5] The following examples are illustrative:

(a) In his first affidavit, Mr. Peplow stated that Mr. Walker showed him the declaration under penalty of perjury which Mr. Walker wanted Mr. Peplow to sign. (Snyder Ex. 1, p. 2.) In his second affidavit, Mr. Peplow stated that Mrs. Walker showed him the declaration. (Snyder Ex. 19, p. 2.) At the hearing, Mr. Peplow could not remember who showed him the declaration. (Tr. 728.)

(b) Mr. Peplow edited his second affidavit in two places to state that Mr. Walker did "a lot" of the talking instead of "most" of the talking. However, Mr. Peplow stated elsewhere in that affidavit that Mr. Walker "was the principal talker for them." (Snyder Ex. 19, p. 1.)

(c) In both of his affidavits, Mr. Peplow claimed that Mr. Walker left a copy of Snyder's engineering proposal at the end of the second meeting. (Snyder Ex. 18, p. 3 and Ex. 19, p. 2.) At the hearing, Mr. Peplow could not remember whether the engineering was given to him at the second or third meeting. (Tr. 650-51, 739-40.)

(d) Mr. Peplow claimed in his first affidavit that he talked with Mr. Walker at the third meeting for about one hour. (Snyder Ex. 18, p. 3.) At the hearing, Mr. Peplow testified that they talked for 10 to 20 minutes. (Tr. 651.)

(e) Mr. Peplow testified at the hearing that Mrs. Walker did not mention at the first meeting that she was there to discuss matters concerning an application she had pending for an FCC license. (Tr. 700-1.) At his earlier deposition, Mr. Peplow testified that Mrs. Walker did mention this at the first meeting. (Tr. 701.)

(f) Mr. Peplow reaffirmed at the hearing that his two affidavits were true and correct to the best of his knowledge and belief. (Tr. 615, 627.) However, he conceded that, due to the lapse of time between the meetings and the signing of his affidavits, it was "very possible" that he forgot or confused some things. (Tr. 725.)

(g) When asked at the hearing about an option agreement he signed, Mr. Peplow testified that he does "not usually" review documents carefully before signing them. (Tr. 703-4.)

(h) In her affidavit, Mrs. Peplow stated that at the second meeting Mr. Walker gave them the declaration under penalty of perjury for Mr. Peplow to sign. (Snyder Ex. 20, p. 1.) At the hearing, Mrs. Peplow initially testified that she did not remember which Walker brought the declaration to the meeting, and then testified that she first saw it lying on the dining room table but did not see who put it there. (Tr. 817.)

(i) In her affidavit, Mrs. Peplow claimed that Mr. Walker gave them a copy of Snyder's engineering proposal at the second meeting. (Snyder Ex. 20, p. 1.) At the hearing, Mrs. Peplow testified that she did not remember whether the Walkers brought anything other than the declaration to the second meeting. (Tr. 841, 886.)

(j) In her affidavit, Mrs. Peplow recalled that at the second meeting Mr. Walker referred to Snyder as a "radio tycoon," that Mrs. Walker "said other people were paying for the right to use transmitter sites," and that "they [the Walkers] were both opposed to someone called Snyder." (Snyder Ex. 20, p. 1.) At the hearing, Mrs. Peplow did not recall these specifics. (Tr. 865-70.) Indeed, Mrs. Peplow admitted that she was not paying attention to the conversation. (Tr. 868, 870.)

(k) At the hearing, Mrs. Peplow testified that, on the day of the third meeting, Mr. Walker appeared at her house only once and that she reluctantly advised him that he could find Mr. Peplow at one of two places. (Tr. 821-24, 827.) At her deposition, Mrs. Peplow believed that Mr. Walker probably came to her house twice, the second time after he could not find Mr. Peplow at the place Mrs. Peplow initially suggested, and asked where else Mr. Peplow could be found. (Tr. 836-37.) After being referred to her deposition, Mrs. Peplow testified at the hearing that she was not sure about whether Mr. Walker came back a second time that day. (Tr. 837.)

8. The record further reflects that the Peplows had a motive to help Snyder prevail in this proceeding. On April 26, 1991, several days after being informed at the meetings that his property had been specified as a transmitter site in Snyder's application, Mr. Peplow entered into an agreement giving Snyder the option to purchase his property for $160,000. (NPB Ex. 15.) Mr. Peplow expected Snyder to purchase the property for this amount if he gets the permit to build the station. (Tr. 699.) The original option agreement expired and was renewed on September 23, 1991 (Snyder Ex. 17), just two days after Mr. Peplow signed his first affidavit in this proceeding (Snyder Ex. 18, p. 4). The Peplows have already been paid $12,500 pursuant to the option, and would continue to

receive $2,500 on a quarterly basis as long as Snyder wishes to maintain the option. (Tr. 698.) Mr. Peplow acquired this land for $45,000 in 1986. (Tr. 690.)

9. Finally, it is clear from the Peplows' testimony that their actions in this matter were, at least in part, influenced by their business dealings with Snyder and by their economic self-interest. Mr. Peplow was not willing to sign the declaration under penalty of perjury for Mrs. Walker although he admitted that the facts contained therein were accurate. (Tr. 721, 735.) On the other hand, the Peplows had no problem signing three affidavits for Snyder. They believed they had nothing to gain by cooperating with the Walkers, and something to gain by assisting Snyder. Mrs. Peplow testified that she thought of Snyder as a potential buyer of the property, but never thought about the Walkers in that way. (Snyder Ex. 20, p. 1; Tr. 864-65.) Mr. Peplow was willing to sign the Snyder affidavits because Snyder had an option at that point in time and was a potential buyer; Mr. Peplow and Snyder had a business deal and Mr. Peplow did not want something to happen that might jeopardize that deal. (Snyder Ex. 18, p. 3; Tr. 722-23, 736-37.)

10. In sum, the conflicts, inconsistencies and lack of specificity in the Peplows' testimony, when coupled with their economic motivation to aid Snyder, tilt the resolution of Issues 7, 8 and 9 in the direction of NPB. It is, therefore, ultimately concluded that Mr. Walker was not impermissibly involved in the meetings in question, that Mrs. Walker did not misrepresent facts or lack candor in her testimony or declarations, and that NPB is basically qualified to become a Commission licensee.

PETITION FOR LEAVE TO AMEND

11. NPB seeks leave to amend its application to report that, contingent on the approval of the Joint Request for Approval of Settlement Agreements, Mrs. Walker will become the sole shareholder of the applicant. NPB states that only Mrs. Walker is willing to contribute the considerable funds necessary to settle this proceeding and the other NPB shareholder, Floyd Patterson, will be giving up his interest in the applicant. The petition for leave to amend is unopposed.

12. NPB's petition will be granted and its amendment accepted. Suffice it to say, NPB has shown good cause for the relief requested.

JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENTS

13. NPB, Creative and Snyder have entered into settlement agreements which have been submitted for approval. Pursuant to the agreements Creative and Snyder will dismiss their applications for monetary consideration from NPB not to exceed the legitimate and prudent expenses of Creative and Snyder in preparing, filing, prosecuting and settling their applications. In support of the joint request the applicants have demonstrated compliance with Section 73.3525(a) of the Commission's Rules. Specifically, the applicants have shown that their respective applications were not filed for the purpose of reaching or carrying out a settlement agreement, that the amount promised is all that will be paid, that such amount is not in excess of the legitimate and prudent expenses of Creative and Snyder, that there are no ancillary agreements, and that approval of the agreements will serve the public interest. In addition, Creative and Snyder have provided an itemized accounting of their reimbursable expenses, and have established that their legal expenses and disbursements related to the prosecution of their applications exceed the amount of consideration to be paid by NPB.

14. Having complied with the Commission's rules regarding settlements of this nature, the applicants' joint request will be granted and the settlement agreements approved. Moreover, with the favorable resolution of Issues 7, 8 and 9 there remains no impediment to a grant of the NPB application, and it will be granted.

Accordingly, IT IS ORDERED that the Motion for Summary Decision and Findings of Fact and Conclusions of Law on Issues 7, 8 and 9, filed by NPB on July 24, 1992, IS GRANTED, and Issues 7, 8 and 9 ARE RESOLVED in favor of NPB.

IT IS FURTHER ORDERED that the Contingent Petition for Leave to Amend filed by NPB on July 10, 1992, IS GRANTED and the accompanying amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the Joint Request for Approval of Settlement Agreements filed by NPB, Creative and Snyder on July 6, 1992, IS GRANTED; that the settlement agreements ARE APPROVED; that reimbursement to Creative in the amount of $152,250 IS AUTHORIZED; that reimbursement to Snyder in the amount of $100,000 IS AUTHORIZED; and that the applications of Creative Broadcasters, Inc., and Larry E. Snyder t/a Don Kelly Radio ARE DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of New Paltz Broadcasting, Inc. (File No. BPH-880630NS) for a construction permit for a new FM station on Channel 227A at New Paltz, New York, IS GRANTED.[9]

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

FOOTNOTES

[1] The applications of Simply Broadcasting, Jeffery Busch, Skytop Telecom, Inc., and Hermine A. Segal were also designated for hearing. Each of these applications was subsequently dismissed. *See Order*, FCC 90M-3844, released December 5, 1990, and *Memorandum Opinion and Order*, FCC 91M-1191, released April 4, 1991.

[2] Mrs. Walker is president, director, and 50 percent shareholder of NPB. The remaining 50 percent interest in NPB is held by Floyd Patterson, who is secretary/treasurer and director of the applicant. (NPB Ex. 1, p. 1.) Mr. Walker purportedly has no interest or participation in the NPB application. (*Id.*, at p. 3.) At the time of the hearing, Mr. Walker was the permittee of an FM station in Fort Plain, New York. (*Id.*)

[3] NPB filed an Erratum on August 5, 1992.

[4] The hearings which specifically related to Issues 7, 8 and 9 were held on April 22, 23, 28 and 29, 1992.

[5] In contrast, the testimony of Mr. and Mrs. Walker does not suffer from these infirmities.

[6] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-178

In the Matter of

Amendment of Section 73.202(b), RM-8045
Table of Allotments,
FM Broadcast Stations.
(Lawton, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: July 28, 1992; Released: September 8, 1992

Comment Date: October 30, 1992
Reply Comment Date: November 16, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Communicorp, Inc. ("petitioner"), requesting the substitution of Channel 231C2 for Channel 232A at Lawton, Oklahoma, and the modification of Station KQLI's license to specify operation on the higher class channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 231C2 for Channel 232A at Lawton since it could provide the community with an additional wide coverage area FM service and enable Station KQLI to expand its service area. Channel 231C2 can be allotted to Lawton in compliance with the Commission's minimum distance separation requirements at the station's licensed transmitter site.[1] As requested, we also propose to modify Station KQLI's license to specify Channel 231C2. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Lawton or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Lawton, Oklahoma	232A, 237A, 251C1, 258C2, 268C1, 297C	231C2, 237A, 251C1, 258C2, 2268C1, 297C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 30, 1992,** and reply comments on or before **November 16, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Colby M. May, Esq.
May & Dunne, Chartered
1000 Thomas Jefferson Street, N.W.
Suite 520
Washington, D.C. 20007
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 231C2 at Lawton are North Latitude 34-34-24 and West Longitude 98-28-40.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-195

In the Matter of

Amendment of Section 73.202(b), RM-7146
Table of Allotments,
FM Broadcast Stations.
(Beverly Hills, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 3, 1992; Released: September 8, 1992

Comment Date: October 30, 1992
Reply Comment Date: November 16, 1992

By the Chief, Allocations Branch:

1. The Commission has before it a petition for rule making filed by Heart of Citrus, Inc. ("Heart of Citrus"), permittee of Station WPDS, Channel 246A, Beverly Hills, Florida, proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills, Florida, and the modification of its Station WPDS construction permit to specify operation on Channel 246C3. Heart of Citrus states that it will apply for the upgraded channel.

2. We believe that the public interest would be served by proposing the substitution of Channel 246C3 for Channel 246A at Beverly Hills, Florida. Channel 246C3 can be allotted to Beverly Hills in compliance with the Commission's minimum spacing requirements.[1] As requested, we also propose to modify the construction permit of Station WPDS to specify operation on Channel 246C3. In accordance with Section 1.420(g) of Commission's Rules, we will not accept competing expressions of interest in the use of Channel 246C3 at Beverly Hills or require Heart of Citrus to demonstrate the availability of an additional Class C3 allotment for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Beverly Hills, Florida	246A	246C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by Paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 30, 1992,** and reply comments on or before **November 16, 1992,** and are advised to read the Appendix for proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gammon and Grange
Counsel for Heart of Citrus, Inc.
1925 K Street, NW
Suite 300
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such request or a summary of any new oral information shall be served by the person making the presentation upon other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The reference coordinates for the Channel 246C3 allotment at Beverly Hills, Florida, are 28-47-46 and 82-28-31. This site is 13.4 kilometers (8.3 miles) south of Beverly Hills. In this regard, we note that this proposal conflicts with a Channel 247C2 upgrade proposal for Micanopy, Florida, and a Channel 246C2 upgrade proposal for Holiday, Florida. Both of these proposals were denied in MM Docket No. 87-455, 7 FCC Rcd 2557 (1992), *application for rev. pending.*

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-194

In the Matter of

Amendment of Section 73.202(b), RM-8052
Table of Allotments,
FM Broadcast Stations.
(Essex, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 3, 1992; Released: September 8, 1992

Comment Date: October 30, 1992
Reply Comment Date: November 16, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Dunes Broadcasting ("petitioner") requesting the allotment of Channel 280B to Essex, California, as that community's second local FM service. Petitioner stated its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 280B to Essex since it could provide a second local FM service to the community. Channel 280B can be allotted to Essex consistent with the minimum distance separation requirements of Section 73.207(b)(1) and (3) of the Commission's Rules, without the imposition of a a site restriction.[1] However, since Essex is located within 320 kilometers (199 miles) of the United States-Mexican border, the Commission must seek concurrence of the Mexican Government in the proposal.

3. Accordingly, we believe it is appropriate to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Essex, California	255B	255B, 280B

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **October 30, 1992,** and reply comments on or before **November 16, 1992,** and are advised to read the Appendix for the proper procedures. Comments should also be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Peter Gutmann, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 280B are 34-44-12 and 115-14-48.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-534

In the Matter of

Amendment of Section 73.202(b),	RM-7519
Table of Allotments,	RM-7632
FM Broadcast Stations	
(Mount Olive and Breese,	
Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 13, 1992; Released: September 8, 1992

By the Chief, Allocations Branch:

1. Pursuant to the request of Radio Latino ("Latino"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6573 (1991), proposing the allotment of Channel 287A to Mount Olive, Illinois, as that community's first local FM broadcast service. In response to the *Notice*, the petitioner filed comments restating its intention to apply for Channel 287A, if allotted, and Breese Broadcasting ("BB") filed a counterproposal seeking the allotment of Channel 287A to Breese, Illinois, as that community's first local service.[2] Latino filed reply comments.

2. The proposals for Channel 287A at Mount Olive and Breese, are mutually exclusive. BB states that Breese, Illinois, is an incorporated community with a population of 3,516, according to the 1980 U.S. Census.[3] BB goes on to state that Breese is governed by a "mayor-and-aldermanic" form of government. It has a police and fire department, three churches, two theaters, a library, two high schools, three grammar schools, two banks, one savings and loan facility and a chamber of commerce. Breese also has its own newspaper and a city owned electrical power plan. BB states that despite its status as a fully functioning community, Breese lacks a local transmission service. BB argues that Breese has a greater need for FM service than Mount Olive. BB states it intention to apply for Channel 287A at Breese, if allotted.

3. In reply comments, Latino states that it has performed a channel search and determined that Channel 248A is an additional equivalent channel available for allotment to Breese, Illinois. Latino states that the public interest favors grant of this alternate proposal, since Mount Olive will be able to receive its first local service, without denying Breese the opportunity to obtain first local FM service.

4. After consideration of the information filed in this proceeding, we believe the public interest would be served by providing both Mount Olive and Breese with a first local FM service. Because channels are available to satisfy each expression of interest, a comparative analysis is unnecessary. As stated in the *Notice*, Channel 287A can be allotted to Mount Olive in compliance with the Commission's minimum distance separation requirements.[4] Channel 248A can be allotted to Breese in compliance with the Commission's minimum distance separation requirements with a site restriction of 5.5 kilometers (3.4 miles) east of the community,[5] in order to avoid a short-spacing to Station KYKY-FM, Channel 251C1, St. Louis, Missouri.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 23, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Breese, Illinois	248A
Mount Olive, Illinois	287A

6. The window period for filing applications will open on **October 26, 1992,** and close on **November 25, 1992.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Breese, Illinois, has been added to the caption.
[2] Public Notice of the counterproposal for Breese, Illinois, was given on February 15, 1991, Report No. 1838.
[3] The 1990 U.S. Census reports the population of Breese as 4,612.
[4] The coordinates for Channel 287A at Mount Olive are North Latitude 39-04-20 and West Longitude 89-43-38.
[5] The coordinates for Channel 248A at Breese are North Latitude 38-36-30 and West Longitude 89-27-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-593

In the Matter of

Amendment of Section 73.202(b),	RM-6490
Table of Allotments,	RM-6713
FM Broadcast Stations.	
(Wetumpka, Brantley and Luverne, Alabama)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 14, 1992; Released: September 8, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the allotment of Channel 282A to Wetumpka, Alabama, as a first local FM service. 4 FCC Rcd 697 (1989). Brantley Broadcast Associates ("Brantley Broadcast") filed a Petition for Acceptance of Late-Filed Comments, a Counterproposal, and Reply Comments. William B. Grant ("Grant") filed Comments and Reply Comments. Brantley Broadcast filed a Motion for Leave to File Supplemental Comments and Supplemental Comments. For the reasons discussed below, we are allotting Channel 250A to Wetumpka, Alabama, and are upgrading Station WDHT, Channel 282A, Brantley, Alabama, to specify operation on Channel 282C1 and reallotting the channel from Brantley to Luverne, Alabama.

2. This proceeding began with the filing of a Petition for Rule Making by Grant proposing the allotment of Channel 282A to Wetumpka as a first local FM service. Prior to the release of the *Notice*, Brantley Broadcast, permittee of Station WDHT, Channel 282A, Brantley, Alabama, filed a Petition for Rule Making proposing the substitution of Channel 282C1 for Channel 282A, reallotment of the channel to Luverne, Alabama, and modification of its construction permit accordingly. We will process the Petition for Rule Making as a timely filed counterproposal in this proceeding.[2]

Wetumpka, Alabama

3. We will allot Channel 250A to Wetumpka, Alabama, rather than Channel 282A, in order to remove the conflict between the proposals.[3] Brantley Broadcast suggested this alternate channel for Wetumpka in its counterproposal. In response, Grant argued that a Channel 250A "may not be a viable option for Wetumpka" in view of the "mountainous terrain, the availability of electrical power, the availability of land, and current FAA restrictions." However, Grant also stated that he would not be "opposed" to the alternate channel if Brantley Broadcast can locate a transmitter site that would meet Commission and FAA requirements.

4. Brantley Broadcast submitted an engineering exhibit addressing the arguments advanced by Grant. We concur with that engineering exhibit. This exhibit provides a terrain profile along eight radials from the proposed site indicating that there would be no terrain obstruction that would preclude principal city coverage of Wetumpka. Furthermore, Brantley Broadcast states that the site is adjacent to an inhabitated area that is easily accessible by roads and utilities. The exhibit also delineates an area of 2.6 square kilometers for use as a potential transmitter site. Finally, the exhibit notes that the proposed site is 2.31 kilometers (1.44 miles) from a 500-foot tower previously used by Station WHHY, Montgomery, Alabama. On the basis of that 500-foot tower, Brantley Broadcast contends that a Class A FM station utilizing a tower of lesser height would gain FAA approval. Under these circumstances, we believe that it is reasonable to presume that the proposed Channel 250A allotment at Wetumpka would comply with all Commission technical requirements.

Luverne, Alabama

5. We believe that the public interest would be served by substituting Channel 282C1 for Channel 282A, reallotting the channel from Brantley to Luverne, and modifying the construction permit of Station WDHT to specify Channel 282C1 at Luverne, Alabama.[4] This reallotment will serve the Commission's allotment priorities and policies.[5] Luverne (population 2,553) will receive its first local service, and Station WDHT will be able to upgrade its facilities to Class C1 status. On the other hand, Brantley (population 1,015) will retain local transmission service from AM Station WLVN.

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[1] The communities of Brantley and Luverne, Alabama, have been added to the caption.

[2] This is the same proposal advanced by Brantley Broadcast as a counterproposal in its untimely Comments in this proceeding. In view of the fact that we are considering the Brantley Broadcast upgrade and reallotment proposal in this proceeding, we need not consider the Petition for Acceptance for Late-Filed Comments or the untimely Comments filed by Brantley Broadcast.

[3] The reference coordinates for the Channel 250A allotment at Wetumpka, Alabama, are 32-28-23 and 86-09-22. This site is 7.2 kilometers (4.8 miles) east of Wetumpka. Because the underlying petition for rule making was filed prior to October 2, 1989, an applicant for this allotment may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WKKR, Channel 249A, Auburn, Alabama, Station WEZZ, Channel 249A, Clanton, Alabama, and Station WDMT, Channel 250A, Eufaula, Alabama.

[4] The reference coordinates for the Channel 282C1 allotment at Luverne, Alabama, are 32-04-05 and 85-59-35. This site is 46.9 kilometers (29.2 miles) northeast of Luverne.

[5] The FM priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). *See also Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989); *recon. denied in part*, 5 FCC Rcd 7094 (1990).

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 23, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
Brantley, Alabama	262A
Luverne, Alabama	282C1
Wetumpka, Alabama	250A

7. The window period for filing applications for the Channel 250A allotment at Wetumpka, Alabama, will open on **October 26, 1992,** and close on **November 25, 1992.**

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Brantley Broadcast Associates for Station WDHT IS MODIFIED effective **October 23, 1992,** to specify operation on Channel 282C1 at Luverne, Alabama, in lieu of Channel 282A at Brantley, Alabama, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission"s Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-199

In the Matter of

Amendment of Section 73.202(b), RM-8050
Table of Allotments,
FM Broadcast Stations.
(Smiths, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 18, 1992; Released: September 8, 1992

Comment Date: October 30, 1992
Reply Comment Date: November 16, 1992

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Smiths Communications ("petitioner") requesting the allotment of FM Channel 267A to Smiths, Alabama, as that community's first local aural transmission service. Petitioner stated its intention to apply for Channel 267A if allotted to Smiths.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Smiths is not listed in the U.S. Census.

3. In light of Smiths' omission from the U.S. Census, yet in recognition of Commission precedent requiring adequate information in such situations to demonstrate that a locality qualifies as a community for allotment purposes,[1] petitioner states that Smiths is listed in the *Rand McNally Atlas*, which attributes it with a population of 1,700. [2] In addition, petitioner advises that Smiths contains civic organizations, businesses, religious institutions, a bank, post office, water authority, schools, churches and a medical facility. Specifically, petitioner advises that Smiths is served by Smiths Station High School, Smiths Station Primary School, twelve churches, including the Smiths Station Baptist Church, and businesses such as Smiths Big Buy Food Store, Smiths Flower Shop, Southtrust Bank, Smiths Medical Clinic (the latter of which petitioner advises a recent article appeared in the *Columbus (Georgia) Ledger-Enquirer)*, hardware stores and restaurants. Moreover, petitioner advises that the Columbus (Georgia)-Phenix City (Alabama) telephone directory contains numerous Smiths residential as well as business listings. Based upon the petitioner's assertions, we will not request additional demographic data at this time.

4. A staff engineering study reveals that Channel 267A can be allotted to Smiths in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules, provided the transmitter is located 7.4 kilometers (4.6 miles) southwest of the community.[3]

5. We believe the public interest would be served by seeking comments on the requested allotment of Channel 267A to Smiths, Alabama, since it would provide a first local aural transmission service to the community. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Smiths, as follows:

	Channel No.	
City	Present	Proposed
Smiths, Alabama	--	267A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **October 30, 1992,** and reply comments on or before **November 16, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

David M. Silverman, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

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[1] *See, e.g., Gretna, FL, et. al.*, 6 FCC Rcd 633 (1991); *Oak Grove, FL*, 5 FCC Rcd 3774 (1990); *Statenville, GA*, 5 FCC Rcd 2685 (1990); *East Hemet, CA, et. al.*, 4 FCC Rcd 7895 (1989); and *Beaver Springs, PA*, 4 FCC Rcd 5373 (1989).

[2] However, geographical location alone is not sufficient to establish "community" status. *See Vimvile, MS*, 48 Fed. Reg. 5974 (1983); *Hannibal, OH*, 6 FCC Rcd 2144 (1991); and *Columbia, CA*, 6 FCC Rcd 3292 (1991).

[3] Coordinates used for Channel 267A are 32-28-42 and 85-08-06. The site restriction is required to avoid a short spacing to the licensed site of Station WKHX-FM, Channel 268C, Marietta, Georgia, at coordinates 33-48-27 and 84-20-26.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELECOM*USA, INC.,
Complainant,

v. File No. E-90-351

SOUTHWESTERN BELL
TELEPHONE COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: August 31, 1992; Released: September 9, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 8, 1992, the Common Carrier Bureau (Bureau) released an Order in the above-captioned proceeding establishing discovery and briefing schedules.[1] Pursuant to the *Discovery Order*, the parties completed discovery and were to file briefs and reply briefs on July 28, 1992 and August 7, 1992, respectively. However, on July 24, 1992, the parties filed a joint motion for extension of time in which to file briefs and reply briefs. In support of their motion, the parties stated that they had entered into settlement negotiations. The Bureau granted the motion and extended the time for filing briefs and reply briefs by thirty days to August 27, 1992 and September 9, 1992, respectively. On August 26, 1992, the parties filed a second joint motion for extension of time requesting another thirty day extension of time for filing briefs and reply briefs. In support of their motion, the parties state that some progress has been made and settlement negotiations are continuing.

2. Initially, we note that extensions of time are not routinely granted.[2] However, we do wish to reasonably accommodate settlement efforts which could avoid or minimize the expenditure of further time and resources by the parties and the Commission. For this reason, we will further extend the time for filing briefs and reply briefs to September 14, 1992 and September 24, 1992, respectively. We do not, however, anticipate granting a further extension of time in this proceeding absent substantial progress toward settlement or some extraordinary circumstance.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion for Extension filed on August 26, 1992 by Telecom*USA, Inc. and Southwestern Bell Telephone Company IS GRANTED to the extent indicated herein.

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[1] *See* Telecom*USA, Inc. v. Southwestern Bell Telephone Company, 7 FCC Rcd 3521 (Com.Car.Bur. 1992) (*Discovery Order*).

[2] 47 C.F.R. § 1.46(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

SEG CELLULAR LIMITED PARTNERSHIP — File No. 163500-91-26-MHK

Notice of Apparent Liability for Forfeiture Penalty for Station KNKN586 in the Domestic Public Cellular Radio Telecommunications Service serving Market 102A, Des Moines, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: August 25, 1992; Released: September 9, 1992

By the Commission:

I. INTRODUCTION

1. SEG Cellular Limited Partnership (SEG) has filed a Response which requests remission or reduction of the $80,000 forfeiture proposed by the Commission in a "Notice of Apparent Liability for Forfeiture" (*NALF*) released January 8, 1992. *See SEG Cellular Limited Partnership*, 7 FCC Rcd 74 (1991). The SEG filing is unopposed. For reasons discussed below, we grant SEG's request for reduction and reduce the forfeiture to $64,000.

II. BACKGROUND

2. On April 25, 1990, SEG filed an application, FCC Form 401, proposing to construct new cell sites at Indianola and Dallas, Iowa (Indianola/Dallas application) to serve the Des Moines, Iowa Metropolitan Statistical Area (MSA). The Commission's Antenna Survey Branch (ASB) cleared the Indianola cell site but did not clear the Dallas cell site because SEG did not provide the required Federal Aviation Administration (FAA) Determination clearing the site for construction. On August 20, 1990, the Mobile Services Division (MSD) wrote to SEG and requested: (1) a copy of SEG's notification to the FAA for Determination; and (2) a copy of the FAA Determination when it was received by SEG.[1] Because SEG did not respond to the MSD Letter, the MSD did not act on the Indianola/Dallas application.

3. Nevertheless, on November 13, 1990, SEG filed FCC Form 489 notifying the Commission that it had completed construction of the Indianola cell site and a new cell site at Panther, Iowa. In that filing, SEG replaced its Dallas site with the Panther site, which was cleared by ASB. The MSD inadvertently issued an authorization on January 8, 1991, for the Indianola and Panther sites. Upon discovering that it had not yet acted on SEG's original application, MSD notified SEG of the unauthorized construction. On August 5, 1991, SEG filed a request for Special Temporary Authority (STA) to continue cellular operations and, two days later, filed FCC Form 489 as an amendment to correct its unauthorized construction. Because construction of the Panther site was a major modification to SEG's existing facilities, SEG should have filed FCC Form 401, instead of FCC Form 489, to request prior authority for the construction.

4. In the *NALF*, we found that SEG constructed and placed into operation the Indianola and Panther cell sites in apparent violation of both Section 301 of the Communications Act (the Act) and Section 22.3 of the Commission's rules because SEG did not receive authority for construction, and that SEG's construction of the facilities as of January 8, 1991, constituted willful and repeated conduct within the terms of the Act. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991) (*Policy Statement*), *recon. denied*, 70 RR 2d 1206 (1992), *petition for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992), we found that the base forfeiture amount for constructing at an unauthorized location is $40,000 but because SEG constructed unauthorized cells at two different locations, we doubled the forfeiture to $80,000.

III. SEG REQUEST

5. SEG in its Request argues that its construction of the two cells was an inadvertent mistake and not "willful and repeated" conduct within the meaning of Section 503(b) of the Act, as described in the *NALF*. SEG states that there is a distinction between "willful" and "non-willful" violations, *i.e.*, a "willful" act is one committed on purpose and a "non-willful" act is one committed by mistake. According to SEG, unless an exception is made for its construction on the mistaken belief that SEG thought it had an authorization to construct the cells, the concept of willfulness loses all meaning. Likewise, SEG asserts that its violation was not "repeated" because a "repeated" violation could have occurred only if the Indianola and Dallas cells were requested in separate applications. Because there was only one application, there was only one mistake as to whether it was granted; thus, SEG argues it did not repeat the violation by constructing two unauthorized cells. [2]

6. SEG also asserts that the Commission failed to apply the three applicable downward adjustment criteria established in the *Policy Statement*, to the forfeiture amount. First, SEG claims that the violation was minor in nature because the Indianola/Dallas application would have been granted if the already-obtained FAA clearance had been supplied to the Commission. The application was routine and would have been granted but for SEG's failure to submit FAA clearance, which, SEG contends, would have

[1] *See* letter to The Richard L. Vega Group, engineers for SEG, from G. Vogt, Chief, Mobile Services Division, Common Carrier Bureau (Aug. 20, 1990) (MSD Letter), a copy of which was also sent to SEG.

[2] SEG contends that if the application were granted, the Panther cell would have been a permissible relocation of the Dallas cell, pursuant to Section 22.9(d)(7)(ii) of the Commission's rules. Because MSD processed and granted the underlying application, as amended on August 7, 1991, to reflect the Panther cell, without a later public notice, SEG asserts that MSD implicitly acknowledged that the Panther cell was a minor modification to SEG's original proposal.

been unnecessary in any event.[3] SEG asserts that its construction of the Panther cell posed no actual safety hazard because FAA clearance was obtained, proper lighting and marking took place, and the violation occurred due only to SEG's original Cellular Geographical Service Area not encompassing the service areas of the new cells. SEG adds that but "for whatever reason," MSD never received the clearance but the unauthorized construction was not egregious misconduct.

7. Second, SEG argues that it voluntarily disclosed the unauthorized construction on two occasions to the Commission: (1) initially in November 1990, when it filed an FCC Form 489 regarding the construction; and (2) in July 1991, when SEG's Vice President in charge of Engineering and Commission counsel became aware of a potential problem regarding "the grant of the major change application" and called the Commission following SEG's discovery of the fact that the initial application had not been granted. It states that a Commission staff member informed SEG's counsel of the pendency of the investigation but SEG nonetheless should receive credit for trying to inform the Commission of the facts.

8. Third, as to its history of overall compliance, SEG argues that both it and its general partner (United States Cellular Corporation, owner or operator of cellular systems in 91 MSA and Rural Service Area markets) have never been found previously to have violated any Commission rule in any market.

IV. DISCUSSION

9. We reject SEG's argument that its violation does not constitute willful and repeated conduct. Section 312(f)(1) of the Act, which also applies to Section 503(b),[4] provides:

> The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

Therefore, the fact that a licensee's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional; all that is necessary is that the licensee know that it was doing the act in question. *See Southern California Broadcasting Co., supra.* Consequently, because SEG admits that it did construct the two cell sites, SEG's violation was willful. Regarding "repeated conduct," SEG's claim that it had filed only one application for the two cell sites, instead of two applications, does not negate the violation from being classified as "repeated." Simply put, SEG committed two violations by constructing two cells without authorization and, therefore, "repeated" its unauthorized action within the meaning of Section 503(b). Thus, we do not find that doubling the $40,000 base forfeiture (the amount for one unauthorized cell) to $80,000 to be inappropriate.

10. We also reject SEG's argument that its unauthorized construction should be deemed to be minor and the forfeiture should be adjusted downward. No matter how SEG characterizes the nature of its application, the fact remains that SEG constructed entire antenna facilities without authorization. The construction cannot be deemed to be minor based on its supposition that the application was routine and there would not have been any violation at all if the FAA clearance had been supplied to the Commission in a timely manner. This is not a minor instance of unauthorized construction where only initial steps toward construction were taken.

11. We also find that SEG did not voluntarily disclose its unauthorized construction. First, SEG's November 1990 FCC Form 489 notified the Commission that SEG constructed facilities but that same filing did not provide any notification that SEG's constructed facilities were unauthorized. Second, SEG's conversation with a Commission staff member does not constitute official notice. Moreover, SEG acknowledges that when it called the Commission, it was told that the matter already was under investigation by the MSD.

12. We do, however, accept SEG's contention that the forfeiture should be adjusted downward because of the carrier's "history of overall compliance." We find nothing in the Commission's records contradicting SEG's claim in this regard. Consequently, we apply the history-of-overall-compliance downward adjustment criterion and reduce the forfeiture to $64,000.

V. CONCLUSION

13. SEG has justified reduction of the forfeiture based upon history of overall compliance but has not justified remission or reduction on any other grounds. As a result, we reduce the $80,000 forfeiture to $64,000.

VI. ORDERING PARAGRAPHS

14. Accordingly, IT IS ORDERED that the request for remission or reduction in the above-captioned proceeding, filed by SEG Cellular Limited Partnership IS GRANTED TO THE EXTENT INDICATED ABOVE and IS DENIED in all other aspects.

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[3] SEG states that the FAA cleared the Indianola site on April 10, 1990, and cleared the Dallas site on May 9, 1990. It attaches copies of the two FAA Determinations to its pleading. SEG asserts that its supplying the FAA clearance to the Commission "would have been unnecessary if the process of communication between the FAA and the Commission and/or within the Commission" had taken place, *i.e.*, if the May 9th clearance had reached MSD by mid-July. According to SEG, the FAA's Determination Forms 7460-1 (used for FAA clearance) for the Indianola and Dallas cells state: "[I]f the structure is subject to the licensing authority of the FCC a copy of the FAA Determination will be sent to that Agency." Consequently, SEG's position appears to imply that if the Dallas Determination were sent directly by the FAA to ASB, SEG's Indianola/Dallas application could have been granted. We reject SEG's implication because SEG should have been aware, based on prior Commission practice and licensing procedures, that the applicant and not the FAA is the entity responsible for submitting requisite FAA clearances to the Commission. *See* 47 C.F.R. Sec. 22.15(c)(2). Furthermore, MSD specifically requested SEG to provide a copy of the FAA determination (*see supra*, para. 2). *See* 47 C.F.R. Sec. 1.17.

[4] *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

15. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, 47 U.S.C. Sec. 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. Sec. 1.80(f)(4), that SEG Cellular Limited Partnership SHALL FORFEIT to the United States the sum of sixty four thousand dollars ($64,000) for violation of Section 301 of the Communications Act of 1934, and Section 22.3 of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission, payable to the order of the Federal Communications Commission, within thirty (30) days from the date of this Order, to: Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

16. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act of 1934, 47 U.S.C. Sec. 504(a).

17. IT IS FURTHER ORDERED that a copy of this Order BE SENT to SEG Cellular Limited Partnership by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 8, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON NYNEX'S PETITION FOR STRUCTURAL RELIEF

CC Docket Nos. 88-2, Phase I, and 90-623

On August 17, 1992, the New York Telephone Company and New England Telephone and Telegraph Company (NYNEX) filed a notice of compliance with the Open Network Architecture (ONA) requirements for removal of the structural separation requirements that currently govern its participation in the enhanced services industry. Pursuant to the *BOC ONA Amendment Order*, 5 FCC Rcd 3103, the Bell Operating Companies (BOCs) are permitted to petition the Commission for relief from the structural separation requirements if the BOCs are technically prepared to offer their ONA services, have effective federal tariffs for each of their initial interstate ONA services, and have filed state tariffs for each of their initial intrastate ONA services. NYNEX states that it satisfies all of the Commission's conditions for removal of the structural separation requirement.

Interested parties should file comments on NYNEX's notice by **October 7, 1992,** and reply comments by **October 22, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Copies of NYNEX's notice can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

HISPANIC INFORMATION AND TELECOMMUNICATIONS NETWORK, INC.
Aguas Buenas, Puerto Rico — File No. BPLIF-901207DA

UNIVERSITY SYSTEM OF THE ANA G. MENDEZ EDUCATIONAL FOUNDATION
Aguas Buenas, Puerto Rico — File No. BPLIF-910415DD

For Construction Permit and License in the Instructional Television Fixed Service on Channels G1, G2, G3 and G4

MEMORANDUM OPINION AND ORDER

Adopted: August 25, 1992; Released: September 10, 1992

By the Commission:

1. The Commission has before it for consideration the mutually exclusive applications of Hispanic Information and Telecommunications Network, Inc. (HITN) and University System of the Ana G. Mendez Educational Foundation (the Foundation), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels G1-G4 in Aguas Buenas, Puerto Rico. HITN filed a petition to deny the application of the Foundation, and the Foundation filed an Opposition to the petition.

PROCEDURE

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of HITN and the Foundation. Once that determination has been made and the comparative process employed, petitions to deny are considered only if filed against the tentative selectee.

BASIC ELIGIBILITY

3. HITN is qualified to be an ITFS licensee. It is a nonprofit organization whose purposes are educational and include providing educational and instructional television material to accredited institutions. Of the ten colleges and universities proposed as receive sites, one has submitted a letter indicating a familiarity with HITN's program offerings and an intention to receive and utilize those services in its curriculum.[1] In addition, HITN has demonstrated the establishment of a local program committee, a requirement of nonlocal applicants.[2] *See* 47 C.F.R. §74.932(a)(5).

4. The Foundation also is qualified to be an ITFS licensee. It operates a system of three accredited institutions of higher education, whose enrolled students it proposes to serve. In addition, because the Foundation proposes service to two accredited institutions in Puerto Rico which it does not operate, it has submitted letters indicating those institutions' familiarity with the Foundation's program offerings and an intention to receive and utilize the services in the curriculum.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

5. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Second Report and Order*, 101 F.C.C. 2d at 65-72; 47 C.F.R. §74.913. First, four points are awarded to local applicants.[3] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[4] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established

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[1] Although HITN has fulfilled the accreditation requirement by submitting a letter from only one of the ten educational institutions it specifies as receive sites, in the event of a tie between HITN and Foundation, HITN would be permitted to submit enrollment information for only the single institution, and not the other nine for which no letters of intended use were obtained.

[2] We note that with the July 1986 expiration of the "local priority period," a one-year period when only local entities were eligible to apply for and receive ITFS authorizations, unassigned channels became available to all eligible applicants, including national entities such as HITN. *See Instructional Television Fixed Service - Second Report and Order in MM Docket 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 57 (1985); *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket 83-523 (Second Report and Order Recon.)*, 59 R.R.2d 1355, 1358 (1986).

[3] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[4] One point is awarded for a proposed schedule of at least 21 average hours per channel per week of formal educational programming or of at least 41 average hours per channel per week of other ITFS programming. Two points are awarded for a proposed schedule of at least 41 average hours per channel per week of formal educational programming or at least 61 hours per channel per week of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.[5]

6. Under this comparative selection process, HITN and the Foundation are awarded points based on the following criteria:

Localism. HITN, based in New York City, seeks to serve the Aguas Buenas, Puerto Rico area. Because its headquarters is not located within the area it proposes to serve, HITN is not entitled to points for being a local applicant. Because the institutions comprising the Foundation all operate in the area for which the facilities are sought, Foundation is entitled to four points for being local.

Accreditation. Although HITN proposes to serve an accredited institution, a factor satisfying its basic eligibility, it is not an accredited entity in its own right, the status necessary for earning merit points in the comparative process. Therefore, HITN is not entitled to the three points for accredited applicants. The Foundation, an umbrella organization whose membership is composed of entities which are individually eligible for the accreditation points, is entitled to three points. *See Second Report and Order Recon.*, 59 R.R. 2d 1355, 1370 (1986); 47 C.F.R. §74.913, Note 1.

Four-Channel Limitation. Neither HITN nor the Foundation is the licensee of other ITFS facilities in the Aguas Buenas, Puerto Rico area, and their present applications seek the use of only four channels. Thus, HITN and the Foundation each are entitled to the two points for applicants remaining within the four-channel limitation.

Instructional Programming. HITN's illustrative schedule, as submitted with its application,[6] proposes an average of 32.5 hours of non-formal ITFS programming per channel per week while its programming grid proposes 21 hours of formal educational programming and 21 hours of other ITFS programming per channel per week.[7] In such circumstances, where amounts of programming proposed in the schedule and in the grid are inconsistent, we believe it appropriate to consider the lesser amount for purposes of awarding merit points, so long as the excess capacity lease, if one exists, permits that level of programming to be transmitted. Thus, HITN is entitled to no programming merit points.

The Foundation's schedule, as submitted with its application,[8] proposes an average of 45.5 hours of formal educational programming and an average of 23.5 hours of other ITFS programming per channel per week while its grid indicates an average of 46 hours of formal educational programming and 22.13 hours of other ITFS programming per channel per week. Although there are inconsistencies between the schedule and the grid, either proposal entitles the Foundation to two merit points for instructional programming.

E- and F- Channel Group Relocations. Neither HITN nor the Foundation is the current licensee of E or F channels seeking to relocate to other channels. Consequently, neither is entitled to the one point for relocation from these channel groups.

Total. HITN is entitled to points for observing the four-channel limitation, for a total of two points. The Foundation is entitled to points for being local, for being accredited, for observing the four-channel limitation and for proposing an average of at least 41 hours of formal educational programming, for a total of eleven points. Thus, the tentative selectee is the Foundation.

PETITION TO DENY

7. Because the Foundation is the tentative selectee in the comparative process, we must now consider the petition to deny filed against it by HITN. HITN argues that the Foundation's application should be dismissed based on three primary allegations: (1) the Foundation's application is defective with regard to its financial certification because it did not apply for a National Telecommunications and Information Administration (NTIA) grant prior to filing this ITFS application with the Commission; (2) the Foundation's response to the question in the Legal Qualifications portion of Form 330 regarding denied and/or dismissed applications was improperly answered in the negative; and (3) the Foundation's application requires a waiver of the four-channel limitation rule since it is the licensee of a noncommercial television station in the same market as the ITFS facilities it now seeks. Based on these allegations, HITN requests that we dismiss the application of the Foundation and grant that of HITN.

8. Before addressing HITN's arguments, we note that its petition to deny was not timely filed. Pursuant to Section 74.912(a), any party in interest may file a petition to deny an application for new facilities, provided such petitions are filed by the "B" cut-off date. The "B" cut-off date for petitions to deny against the Foundation was June 27,

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[5] If the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523*, 4 F.C.C. Rcd 4830 (1989), and Section 74.913(d) of the Commission's Rules.

[6] Although on October 29, 1991 HITN submitted an amended schedule, the scope of our evaluation is limited to those amendments filed prior to the "B" cut-off date, which was June 27, 1991.

[7] Because the schedule does not indicate which ITFS programs are formal, or those to be delivered to enrolled students for credit, as requested in Question 5, Section IV, of the application, we will consider all programming on HITN's schedule as non-formal for the purpose of determining merit points. However, HITN's programming grid, which represents that there will be at least some formal educational programming, is sufficient to satisfy the programming requirements of Section 74.931(a).

[8] We are unable to consider the Foundation's amended schedule and grid, submitted on July 25, 1991, nearly one month after the "B" cut-off date.

1991, and HITN filed its petition on November 15, 1991, nearly five months after the cutoff date. Relying on *Ralph C. Wilson Industries, Inc.*, 91 F.C.C. 2d 139 (1982), HITN maintains that because circumstances giving rise to the petition did not occur until September 23, 1991, when the NTIA provided HITN a written summary of 1991 NTIA grants, the petition should be accepted as timely filed. We disagree. A list of the 1991 NTIA grant applicants, the information HITN sought from the NTIA in September 1991, was published in the Federal Register on April 2, 1991, 56 Fed. Reg. 13,432 (1991), three months before the "B" cut-off date. Moreover, HITN failed to file a petition based on the allegedly newly acquired information until November 15, 1991, approximately seven weeks after its acquisition of the NTIA summary. Even if exceptional circumstances justifying reasonably late filing of the petition existed, HITN's seven-week delay does not warrant our acceptance of its petition. *Ralph C. Wilson Industries, Inc.*, 91 F.C.C. 2d at 141 n.3. Notwithstanding the untimeliness of the filing, we will accord to the petition, in the exercise of our discretion, the status of an informal objection, pursuant to Section 73.3587 of the Commission's Rules, and address the matters raised on their merits.

9. **Financial Certification.** The Foundation responded affirmatively to Question 1(a) of Section III (Financial Qualifications), FCC Form 330, which seeks to determine whether the application is contingent upon receipt of a grant from NTIA. HITN argues that because the Foundation did not apply for an NTIA grant prior to filing its ITFS application with the Commission, it had no "reasonable assurance" of its financial ability to construct and operate the proposed station. It is established, as HITN concedes, that the "reasonable assurance" standard, originally developed to determine the availability of a broadcast applicant's funds, also applies to applicants proposing an ITFS system. *See, e.g., School District No. 1 in the City and County of Denver*, 3 F.C.C. Rcd 6392, 6395 (1988). The Commission modified this standard with respect to noncommercial broadcast applicants which certify that their applications are contingent upon a financial grant from the NTIA. *See, KQED, Inc.*, 3 F.C.C. Rcd 2821, 2829-2831 (Rev. Bd. 1988), *review denied*, 5 F.C.C. Rcd 1784, 1785 (1990). The certification of reliance on NTIA funding and subsequent filing of an application for funds establishes reasonable assurance, and the Commission's focus is directed to whether the grants relied on actually have been made, not whether they are likely to be made.[9] *KQED, Inc.*, 5 F.C.C. Rcd 1784, 1785 (1990). Therefore, the grant of such an application is conditioned upon the showing, within a reasonable time, that the grant funds are in fact available. *Id.* We find that the "reasonable assurance" standard has been appropriately extended to ITFS applicants, and believe that standard's less stringent corollary regarding noncommercial educational broadcast applicants, focusing on whether the grants relied on have actually been made, is also properly applicable to ITFS applicants.

10. HITN, on the other hand, argues that ITFS applicants should be treated differently and that broadcasting policy and rules should not apply to ITFS applicants for two reasons. First, citing *Telecommunications Research and Action Center v. F.C.C.*, 836 F.2d 1349 (D.C. Cir. 1988), HITN contends that the Commission's decision not to classify ITFS as a broadcast service prohibits application of this less stringent standard to ITFS applicants. While it is true that the Commission does not characterize ITFS as a broadcast service, Section 74.910 specifically makes applicable to ITFS a litany of broadcasting rules found in Part 73. Moreover, Section 74.910 expressly provides that the applicability of other rules in Part 73, where appropriate, is not precluded. The application of broadcast service rules and policies to ITFS in the circumstances presented here is not premised on ITFS applicants providing broadcast-like services; rather it is premised on the directly analogous nature of the funding sources and procedures which face the shared educational purposes of both services. In the latter regard, it should be noted that similarities between the ITFS instructional service and the noncommercial educational broadcast service prompted the Commission to treat ITFS applicants, permittees and licensees in the same manner as their noncommercial educational broadcast station counterparts, exempting them from the schedule of charges applied under the Commission's fee collection program. *See Establishment of a Fee Collection Program*, 3 F.C.C. Rcd. 5987, 5989 (1988), and Section 1.1112 (e)(4) of the Commission's Rules.

11. Second, HITN notes that when the Commission simplified the application process in *Reduction of the Information Required by Specified Application Forms*, 52 R.R. 2d 1362 (1982), it incorporated the grant-contingent language for forms to be used by noncommercial broadcast entities only. We disagree. Although *Application Forms*, 52 R.R. 2d at 1362, noted that the Commission was reviewing all "broadcast application forms" and that the modification in financial certification was applicable to noncommercial broadcast entities, *id.* at 1364, it is clear by its references to ITFS Forms 330-L and 330-R, *id.* at 1363, that the Commission sought to include ITFS applications as well. Further evidence of this intention is the Commission's release of revised Form 330 in May 1987, the first revision since the release of *Application Forms*, which incorporated the grant-contingent language.

12. In view of the foregoing, the filing of the Foundation's ITFS application prior to its filing for NTIA funding is fully acceptable to the Commission. Moreover, we note that the NTIA requires that a grant applicant submit its application to the Commission "at least 60 days prior to the [NTIA] closing date." 15 C.F.R. §2301.8(a). That was the procedure followed in *KQED, Inc.*, 3 F.C.C. Rcd 2601 (Rev. Bd. 1988), *review denied*, 5 F.C.C. Rcd 1784 (1990), where a noncommercial broadcast applicant applied for a construction permit in November 1983, certifying its financial qualifications based in part on NTIA funding, and then filed an NTIA application in January 1986. Here, according to the Foundation it filed its ITFS application in April 1991, in order to comply with the "A" cut-off date

[9] HITN attacks the Commission's relaxation of the standard with regard to noncommercial educational broadcasters as arbitrary and capricious. Although this argument is not relevant to the issues before us, it is clear that the Commission engaged in reasoned decisionmaking, in 1961, when the standard initially was made less stringent for noncommercial broadcasters, acknowledging the inherent differences between applicants for commercial and noncommercial educational services. *NTA Television Broadcasting Corp.*, 22 R.R. 273, 291 (1961).

triggered by other ITFS applications seeking facilities in the San Juan, Puerto Rico area. The Foundation represented it intended to apply, and ultimately did apply, for NTIA funding in January 1992, the first grant round available after the filing of its ITFS application.[10] *See* 57 Fed. Reg. 18603 (1992). In addition, the Foundation asserts that it "expects favorable consideration" of its 1992 application based upon its receipt of NTIA funding in 1990 for the planning study of an island-wide ITFS system. Although HITN argues that the earlier planning study funding is no assurance of funding for the implementation of that plan, we note that no assurances are necessary in light of our policy of focusing on whether grants relied on actually have been made. Nevertheless, a letter was submitted on behalf of the Foundation by NTIA's director of Public Telecommunications Facilities Program, Dennis Connors, who stated that the NTIA usually does not award planning grants unless it anticipates that the plan will result in an application to the NTIA for the construction phase of the project. Accordingly, we find that, contrary to HITN's assertion, the waiting period involved here is within the "reasonable time" noted in *KQED, Inc.*

13. **Legal Qualifications.** HITN argues that the Foundation's negative response to Question 4(d) of the Legal Qualifications section of Form 330, that it has or had no interest in, or connection with, any denied and/or dismissed application, is incorrect and should result in the dismissal of the Foundation's application. While the Foundation confirms HITN's allegation that four of its 1986 and 1987 applications for television auxiliary stations were dismissed, the Foundation maintains that it interpreted Question 4 as requesting information only with regard to denied or dismissed ITFS and full-service broadcast stations. In addition, the Foundation notes that it did not include the applications for auxiliary stations, because it believed the Commission is interested only in applications denied or dismissed with prejudice. Although we agree with HITN that Form 330 does not specifically limit disclosure to dismissals only with prejudice, we find there is no basis to support a finding of misrepresentation or lack of candor. The Foundation's interpretation, albeit incorrect, is understandable given the fact that the application forms used in seeking Commission authority to construct a new commercial or noncommercial educational radio or television broadcast station (FCC Forms 301 and 340) require disclosure only if the prior application was dismissed with prejudice.[11] Here, the Foundation's auxiliary broadcast applications were not dismissed because of any Commission findings of impropriety or lack of qualifications on the Foundation's part.[12] Any motive for concealing such dismissals, as well as any evidence of intent to conceal, elements basic to the issue of misrepresentation, *see, e.g., Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983), are not found in the record of this proceeding or in connection with those dismissed applications. Accordingly, we find that HITN has failed to raise a substantial and material question of fact, requiring additional consideration of this matter.

14. **Four-Channel Limitation.** Finally, HITN contends that the Commission should add the Foundation's noncommercial television station, WMTJ(TV), Fajardo, Puerto Rico, to the four ITFS channels requested in the application before us in determining whether the four-channel limitation is exceeded. We decline to do so. The four-channel limitation of Section 74.902(d) clearly applies to only ITFS channels. *See also Second Report and Order*, 101 F.C.C. 2d 49, 76-77 (1985).

15. Therefore, having considered all of the information submitted, we find the petition to deny filed by HITN fails to raise a substantial and material question of fact requiring a hearing. *See, e.g., Astroline Communications, Inc. v. F.C.C.*, 857 F.2d 1556 (D.C. Cir. 1988).

OTHER MATTERS

16. The Foundation does not propose to lease its excess capacity for non-ITFS use, as permitted by Section 74.931, and no further review of the Foundation's qualifications or proposal is necessary. We further find that the Foundation is fully qualified and that a grant of its application will serve the public interest.

17. Accordingly, IT IS ORDERED, That the petition to deny filed by Hispanic Information and Telecommunications Network, Inc. against the application of the University System of the Ana G. Mendez Educational Foundation, considered as an informal objection, IS DENIED.

18. IT IS FURTHER ORDERED, That the application of the Hispanic Information and Telecommunications Network, Inc. (BPLIF-901207DA) IS DENIED, and the application of the University System of the Ana G. Mendez Educational Foundation for a license for channels G1-G4 in the Instructional Television Fixed Service in Aguas Buenas, Puerto Rico (BPLIF-910415DD) IS GRANTED subject to the condition that it submit satisfactory proof to the Commission within a reasonable period of time that it has received the proposed funding from the National Telecommunications and Information Administration.

19. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

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[10] HITN asserts that even if the Foundation pursues NTIA funding in January 1992, when fiscal year 1992 grant applications are accepted by the NTIA, it would not be until late 1992 when the Foundation would learn whether its proposal was accepted. This nearly two-year interim, between the filing of the Foundation's ITFS application and the possible award of a grant, according to HITN, creates a delay which would frustrate the Commission's goal of fostering the prompt development of the wireless cable industry. Given NTIA's funding cycle and procedures, we do not find, under the circumstances here, the time involved to be unreasonable.

[11] We perceive no reason warranting disparate treatment and are directing the Mass Media Bureau to revise FCC Form 330, Question 4(d), Section II to conform to FCC Forms 301 and 340.

[12] Of the four dismissed applications, two, BPTI-860814MJ and BPTI-860814MN, for STL facilities to be used with noncommercial educational television station WQTO, Ponce, Puerto Rico, were dismissed at the request of the Foundation. The remaining two applications, BPTS-870403MG and BPTS-870403MH, for microwave facilities intended to connect a satellite downlink with noncommercial television station WMTJ(TV), were dismissed following the Foundation's change in plans due to difficulties at the proposed site for the satellite downlink.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

Willie A. Jefferson d/b/a OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS, L.P.	File No. BPH-870820MH
INNOVATIVE WOMEN'S MEDIA ASSOCIATION	File No. BPH-870820MQ
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction Permit for New
FM Station, Channel 275C2,
Shreveport, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1992; Released: September 9, 1992

By the Commission:

1. We have before us the petition for reconsideration that Innovative Women's Media Association ("Innovative") filed on March 16, 1992, and oppositions filed by NTW, Inc. and Caddo Broadcasting Limited Partnership on March 26 and 27. The petitioner urges us to reconsider our decision affirming the dismissal of its application for failure to prosecute, 7 FCC Rcd 1384 (1992), generally contending that the reasons that we gave for doing so will not stand scrutiny.

2. More specifically, Innovative argues, to begin with, that we erred in laying weight on its general partner's deposition testimony that she had hired the applicant's former counsel based on information obtained through acquaintance with "a number of Washington counsel" and from her sons' investigations in response to recommendations. That testimony is irrelevant, according to Innovative, because it has no bearing on the problem that its general partner faced when attempting to find substitute counsel without a conflict of interest stemming from representation of applicants competing in later proceedings with other applications also involving Innovative's limited partner. We never suggested, however, that the testimony has any bearing on that problem. Rather, we merely observed that it undermines the credibility of the general partner's later allegation that she had found it difficult to hire substitute counsel because she knew no communications lawyers.

3. In response to our observation that the alleged difficulty concerning conflicts of interest could have been surmounted by retaining one of the attorneys representing other applicants in which Innovative's limited partner holds an interest, Innovative stresses that the limited partner's "personal communications counsel," who lent some assistance to its general partner in her search for substitute counsel, averred that he could not recommend any of those attorneys because he lacked information as to their competence. The averral is of little moment, however, as there is no showing that the general partner had no means of obtaining information as to those attorneys' qualifications except by consulting that individual.

4. Innovative advances a belated explanation for the two-week delay between the date when its former counsel resigned and the date of the first communication between one of its principals and another attorney concerning representation. Referring to an assertion by its general partner that its former counsel had several times previously warned that he might have to resign but that each time "things had been worked out" and he had continued to represent the applicant, Innovative now alleges that in light of these circumstances its principals were hopeful even after he finally did resign that he would change his mind and that they did not abandon that hope until twelve days later, when he notified the Commission of his withdrawal. This new allegation, which is not supported by an affidavit, is immaterial because it does not indicate that Innovative's principals proceeded with due diligence; although they may have hoped to persuade former counsel to resume the relationship, that was not an adequate reason for deferring contacts with possible substitutes for two weeks after his resignation, in light of the imminence of the hearing.

5. Innovative further argues that it cannot be fairly chastised for declining to prepare hearing exhibits or to make its limited partner available for deposition while awaiting a ruling on the motion for suspension of procedural dates that it filed on the day after the scheduled exhibit-exchange date. That contention is essentially beside the point. The circumstances giving rise to Innovative's failure to prosecute began before it filed its motion for suspension, and the filing of that motion did not excuse its unreadiness to proceed as of the date of the dismissal order. Thus, for reasons already stated, the dismissal of its application was warranted.

6. Finally, Innovative suggests that its former counsel is largely to blame for its problems, asserting that, if he had filed a timely motion for postponement of the procedural schedule on the occasion of his resignation, the ALJ would "almost certainly" have granted it and Innovative would have complied with the revised schedule. This contention is highly speculative and is, in any event, irrelevant to the question as to Innovative's effort to prosecute its application, which, as the record shows, was grossly deficient.

7. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed March 16, 1992 by Innovative Womens' Media Association IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-118

In the Matter of

Amendment of Section 73.202(b),	RM-7667
Table of Allotments,	
FM Broadcast Stations.	
(Wrightsville, Arkansas)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1992; Released: September 9, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 3443 (1992), issued in response to a petition for rule making filed on behalf of Wrightsville Communications Company, Inc. ("petitioner"), permittee of Station KYTN(FM), Channel 299A, Wrightsville, Arkansas, proposing the substitution of Channel 299C2 for Channel 299A and modification of its permit accordingly. Petitioner filed comments in support of the proposal reiterating its intention to apply for Channel 299C2 if allotted to Wrightsville. No other comments were received.

2. We believe the public interest would be served by substituting Channel 299C2 for Channel 299A at Wrightsville since it could provide the community with an expanded coverage area FM service. As stated in the *Notice*, Channel 299C2 can be allotted to Wrightsville at the petitioner's currently authorized site[1] consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules. However, the issuance of a license for Channel 299C2 at Wrightsville may be withheld until Station KAKI(FM), Benton, Arkansas, is licensed on Channel 294C2.[2] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the petitioner's permit for Station KYTN(FM) at Wrightsville, Arkansas, to specify operation on Channel 299C2, as requested.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 26, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Wrightsville, Arkansas	299C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Wrightsville Communications Company, Inc. for Station KYTN(FM), Wrightsville, Arkansas (BPH-871109ME), IS MODIFIED to specify operation on Channel 299C2 in lieu of Channel 299A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Wrightsville Communications Company, Inc., permittee of Station KYTN(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KAKI(FM), Benton, Arkansas, as follows: Bridges Broadcasting Service, 202 East Cross, Benton, AR 72015.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

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[1] Coordinates at the site specified in the construction permit issued for Station KYTN(FM) are 34-36-24 and 92-14-17.

[2] Station KAKI(FM) was modified from Channel 296A to Channel 294C2 in MM Docket No. 87-73. *See* 3 FCC Rcd 4840 (1988), *recon. denied*, 7 FCC Rcd 2555 (1992). A construction permit has been issued to Station KAKI(FM) on Channel 294C2 at coordinates 34-47-56 and 92-29-44 (BPH-881017IC). The licensee of Station KAKI(FM) will be served with a copy of this *Order*.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-417

In the Matter of

Amendment of Section 73.606(b), RM-6108
Table of Allotments,
TV Broadcast Stations.
(*Lima, Ohio, Muncie, Indiana,*
Rockford, Illinois, and
Grand Rapids, Michigan)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 12, 1992; Released: September 9, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the *Report and Order* ("*R&O*") in this proceeding, 3 FCC Rcd 4621 (1988), filed by Lima Communications Corporation ("WLIO"), licensee of television Station WLIO, Channel 35, Lima, Ohio. The *R&O, inter alia,* substituted noncommercial educational ("NCE") UHF television Channel *61 in Lima, Ohio, for unused and unapplied for NCE UHF television Channel *17 in Muncie, Indiana, and reallotted Channel 17 to Lima, Ohio, as its third commercial TV channel.[1] WKBN Broadcasting Corporation ("WKBN"), proponent of the Lima channel change, filed an opposition to the Petition and WLIO filed a reply.[2]

2. The *R&O* found that despite the Commission's general policy not to look favorably on dereservation of lower UHF TV channels and the substitution of higher UHF TV channels, even where the channels are presently unused and unoccupied, the public interest would be served by granting WKBN's proposal. We found that the provision of a third commercial TV channel in Lima would provide the public interest benefits of increased diversity of programming choices, and such benefits could be achieved with no disruption of existing service or any disturbance of the existing mix of channels at any community. The *R&O* considered the substitution of Channel *61 for Channel *17 in Muncie as resulting in equivalent services. WLIO asserted in reply comments that vacant Channel *57 in Lima was also available for dereservation. The *R&O* concluded that WLIO's proposal did not address the issue in question, which was not whether the allotment of a third commercial TV service in Lima had sufficiently compelling public interest benefits that would warrant depriving Lima of a potential NCE service, but rather whether the proposal promised public interest benefits in Lima that were sufficiently great to warrant substitution in Muncie of one NCE channel for another. Accordingly, the Lima Channel *57 dereservation was not adopted.

3. WLIO contends in its petition for reconsideration that the *R&O* was based on an "inaccurate evaluation of the public interest," and that it "virtually precludes the possibility of any commercial service at Muncie."[3] WLIO argues that if any dereservation of NCE channels occurs, it should be that of vacant and unapplied-for Channel *57 in Lima and not Channel *17 in Muncie. WLIO further contends that the availability of Channel *57 in Lima is

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[1] The *R&O* also modified the offsets for TV Channel 17- in Rockford and Channel 17 in Grand Rapids to specify Channel 17+ and Channel 17-, respectively, in order to accommodate the proposed Lima and Muncie channel frequency offsets. Neither community is affected by the instant action.

[2] After the petition for reconsideration was filed, Trinity Christian Center of Santa Ana, Inc., d/b/a Trinity Broadcasting Network ("Trinity"), filed a request seeking the revision of the reference coordinates for Lima Channel 17 to specify a site 2.4 kilometers (1.5 miles) southwest of the present coordinates, at North Latitude 40-34-30 and West Longitude 84-28-30. Trinity seeks this change in order to accommodate a proposed relocation of its transmitter site for Station WDLI, Channel 17, Canton, Ohio. The site of the proposed relocation is currently short-spaced to the Lima reference coordinates, and the short-spacing would be alleviated by the use of alternate coordinates. Trinity claims that the relocation of Station WDLI's transmitter would increase the station's area and population coverage.

We will consider Trinity's request as late-filed comments in this proceeding on our own motion. We note that our policy is not to change reference coordinates outside of a rule making proceeding or to initiate a proceeding solely to change reference coordinates. This policy protects the integrity of the Television Table of Allotments. However, when, as here, a request to change the reference coordinates of a specific channel in a particular community is filed during the pendency of a proceeding concerning that channel and community, we believe consideration of the request is warranted. *Cf. Grenada et al., Mississippi* (MM Docket No. 89-406), 7 FCC Rcd _____ (released July 28, 1992) (request to change reference coordinates for a community not previously considered in the rule making proceeding denied). Trinity has demonstrated that this minor shift in reference coordinates will serve the public interest, as Station WDLI will be able to file an application that may result in improvements to its service area. Therefore, we will change the reference coordinates for Lima as requested.

[3] As an initial matter, WLIO argues that the public interest would be better served by retention of reserved Channel *17 at Muncie because of the "expected eventual move of the NCE licensee in Muncie, Ball State University, ("Ball State"), to unused and unoccupied Channel *17 from its current operation on commercial Channel 49. Substituting reserved Channel *61 for Channel *17, argues WLIO, would effectively prevent Muncie from receiving its own local commercial TV service, as Ball State is unlikely to operate on a higher channel than its present authorization, due to the allegedly greater operational costs and lower efficiencies. Therefore, WLIO maintains, Channel 49 will not become available for commercial use. Whether Ball State will choose to shift its operations to any reserved channel is open to question. As we noted in the *R&O*, Ball State was served with a copy of the *Notice of Proposed Rule Making* in this proceeding, 2 FCC Rcd 6233 (1987), but failed to file comments expressing an interest in Channel *17 at Muncie. Therefore, we concluded that Ball State had no interest in the channel. WLIO offers no evidence to the contrary. We need not reconsider this argument herein.

not "irrelevant" to this proceeding. It would not deprive Lima of its only potential NCE service, WLIO contends, because Lima would continue to receive the "virtually identical" NCE service provided by WBGU, which had operated on Lima Channel *57. WBGU now operates from the same site, but on Channel *27, Bowling Green, Ohio. WLIO argues that Channel *27 in Bowling Green would serve as an adequate substitute for a dereserved Channel *57 in Lima.[4]

4. In opposition, WKBN claims that the arguments in WLIO's reconsideration have been fully considered and rejected by the *R&O*. WKBN asserts that in rearguing these matters, WLIO improperly cites and relies upon facts that were not previously presented to the Commission. Specifically, WKBN states that WLIO's discussion of the provision of NCE TV service to Lima by the station licensed to Bowling Green was not previously presented for consideration. It insists that the facts relied upon by WLIO are neither new nor were unavailable at the time comments were filed. Therefore, the petition for reconsideration is in violation of Section 1.429(b) of the Commission's Rules. Nevertheless, argues WKBN, in addition to failing to demonstrate why consideration of such information is in the public interest, WLIO's information is "manifestly irrelevant to the proceeding." In reply, WLIO contends again that the staff failed to appreciate fully the public interest consequences of the *R&O's* effect on the likelihood of commercial service at Muncie and dismissed the availability of Channel *57 in Lima with inadequate consideration.

5. *Discussion*. WLIO's Petition for Reconsideration will be denied. First, we agree with WKBN's claim that WLIO reargues matters raised during the proceeding and disposed of in our *R&O*. The Commission will not grant reconsideration based on reargument of matters already deliberated and decided. *See, e.g., Eagle Broadcasting Company v. FCC*, 514 F.2d 852 (D.C. Cir. 1952). Furthermore, the Commission will not grant reconsideration based on facts not previously presented unless those facts could not have been uncovered before the last opportunity to present them. *See* Section 1.429 of the Commission's Rules. Alternatively, a petition must show that reconsideration would be in the public interest. The new material in WLIO's Petition, the detailed discussion of the availability of NCE TV service in Lima as provided by Station WBGU, Bowling Green, was readily available to WLIO at the time of filing comments. In any event, this information is not relevant to the resolution of the paramount issue, which is whether the public interest would be served by providing for a third commercial TV channel in Lima by allowing a substitution of a reserved channel in Muncie.

6. While the Petition fails on procedural grounds, we take this opportunity to comment on the essence of WLIO's argument. WLIO argues that we failed to adequately address the possibility that our actions in the *R&O* effectively preclude Muncie from receiving its own local commercial TV channel. However, the issue is not whether Muncie would be deprived of a commercial channel. Indeed, our action did not delete any commercial channel allotted to Muncie, and no party has expressed an interest in having a commercial channel allotted to Muncie.[5]

7. The fact that noncommercial service is provided to Lima by Station WBGU, Bowling Green, is accorded no weight in our decision. The dereservation of Channel *57 in Lima would deprive that community of its only currently allotted NCE TV channel, whereas the dereservation of Channel *17 in Muncie and the allotment of Channel *61 will not deprive Muncie of potential NCE service. The fact that WBGU presently provides NCE TV service to Lima does not alter the fact that Lima would be deprived of its only potential local NCE service were Channel *57 dereserved. Therefore, in providing for a new commercial channel in Lima, the public interest is better served by retention of the potential for a local NCE TV service in Lima than by the loss of such potential by dereserving Channel *57.

8. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b), and 0.283 of the Commission's Rules, IT IS ORDERED That the Petition for Reconsideration filed by the Lima Communications Corporation IS DENIED.

9. IT IS FURTHER ORDERED That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Memorandum Opinion and Order* to Joseph E. Dunne III, May and Dunne, Chartered, 1000 Thomas Jefferson Street, N.W., Suite 520, Washington, D.C., 20007 (counsel for Trinity Christian Center of Santa Ana, d/b/a Trinity Broadcasting Network).

10. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact J. Bertron Withers, Jr., Mass Media Bureau, (202)634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[4] WLIO also presented in its petition an engineering statement discussing the availability of channels as possible alternatives to the allotment of Channel *61. However, our analysis of this statement indicates that no acceptable alternative channel is available. Furthermore, this new material cannot serve as any basis for a grant of reconsideration because it clearly could have been previously presented to the Commission. *See* Section 1.429(b).

[5] We note that WLIO in its comments to the *Notice* expressed its concern that commercial operation of Channel 17 in Lima would result in increased competition to WLIO, while contending that its opposition to the allotment rested on its public interest concerns with depriving Muncie of a commercial allotment on Channel 17. The weight we accord to those concerns is greatly diminished by the lack of interest demonstrated in operating a Muncie commercial station on Channel 17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-51

In the Matter of

Amendment of Section 73.202(b), RM-7625
Table of Allotments,
FM Broadcast Stations.
(Steeleville, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 13, 1992; Released: September 9, 1992

By the Chief, Allocations Branch:

1. Pursuant to the request of Steeleville Communications ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 1478 (1991), proposing the allotment of Channel 248A to Steeleville, Illinois, as the community's first local FM service. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. Upon further review of this proposal, we find that Channel 248A cannot be allotted to Steeleville in compliance with the Commission's minimum distance separation requirements. The channel would be short-spaced to the proposed allotment of Channel 248A to Breese, Illinois, as requested by Breese Broadcasting in MM Docket No. 90-534. *See* 5 FCC Rcd 6573 (1991) and counterproposals thereto. The Steeleville proposal was filed after the time for filing comments and counterproposals in MM Docket 90-534. Therefore petitioner's request for Channel 248A cannot be considered in the context of that proceeding. *See New London, New Hampshire*, 4 FCC Rcd 5595 (1989), *rev. on unrelated grounds*, 6 FCC Rcd 5163 (1991). Finally, although the staff performed a channel search, we were unable to find a substitute channel for allotment to either community.

3. Accordingly, based on the above discussion, IT IS ORDERED, That the petition for rule making submitted by Steeleville Communications for the allotment of Channel 248A to Steeleville, Illinois, IS DENIED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
TV Broadcast Stations.
(London, Kentucky)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: August 13, 1992; Released: September 9, 1992

By the Chief, Policy and Rules Division:

1. Before the Commission is a Petition for Reconsideration filed by Thomas J. Josephsen ("Josephsen") of a staff letter returning as unacceptable a Petition for Rule Making proposing the allotment of Channel 7 to London, Kentucky, as that community's first local television service.[1] No comments were filed in response to Josephsen's petition for reconsideration.

2. *Background.* This proceeding originated with a petition for rule making filed by Josephsen to allot Channel 7 to London, Kentucky. The petition specifically requested a waiver of the minimum separation requirement of Section 73.610 of the Commission's rules for the reason that no site could be located which would be fully spaced to all licensed stations. Josephsen specified a site which is 3.5 kilometers (2.14 miles) short-spaced to Station WSPA, Spartanburg, South Carolina. Josephsen contends that the short-spacing from this site is *de minimis* and offers to provide equivalent protection to Station WSPA by adjusting the power and height of the antenna.[2] Josephsen argues that the public service benefit of providing the first local television transmission service to London, Kentucky, (population 4,002)[3] and to Laurel County (population 38,982) is sufficient to warrant a waiver of the minimum spacing rules. In addition, Josephsen states that the allotment of Channel 7 will provide a second television reception service to 46,600 persons and additional television reception service to a total of 711,000 persons in a 25,200 square kilometer area.

3. The staff letter denied Josephsen's proposal as technically deficient due to the short spacing. The letter noted that UHF or low power television was available to serve the community, which would not require a waiver of the minimum separation rules. The letter also rejected Josephsen's offer of equivalent protection although it acknowledged that the Commission was considering the use of equivalent protection in allotting VHF channels in BC Docket No. 80-499.[4]

4. *Petition for Reconsideration.* Josephsen argues that the public interest benefits of his proposal warrant a waiver of the minimum spacing rules. He claims that absent a waiver, London and Laurel County, Kentucky, will be deprived of first local television transmission service and that an additional 46,600 people would be deprived of second television reception service. Additionally, Josephsen states that neither UHF nor low power television would provide the public interest benefits available with the use of a VHF channel.

5. Josephsen contends that the use of equivalent protection will prevent objectionable interference to Station WSPA, Spartanburg. Josephsen cites to the *VHF Drop-In Proceeding*, in which the Commission granted waivers of the minimum separation requirements for four petitions for VHF allotments, requiring each new station to provide equivalent protection to the existing stations to which they would be short-spaced. Additionally, Josephsen argues that the pendency of BC Docket No. 80-499 does not preclude the Commission from granting a waiver request.

6. *Discussion.* For reasons discussed below we will deny Josephsen's petition for reconsideration. As an initial matter, we note that the Commission has instituted a freeze on new television allotments in certain metropolitan areas. *See Order, In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, ("Freeze Order")*, 52 Fed. Reg. 28346, July 29, 1987. Although not discussed in our original response to Josephsen, our engineering analysis conducted in response to the petition for reconsideration has determined that the proposed site for an allotment of Channel 7 to London, Kentucky is located 245.7 kilometers (152.7 miles) from Nashville, Tennessee, a market listed in the *Freeze Order*.[5] The *Freeze Order* prohibits the allotment of new channels within the minimum co-channel distance (304.9 kilometers) (189.5 miles) of a market listed in the order.

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[1] *See Letter* from Chief, Allocations Branch, to counsel for Thomas J. Josephsen (September 8, 1989).

[2] Equivalent protection is "the principle that the new station using the short-spaced assignment will protect existing stations by reducing power or using directional antennas...so that the interference created would be no more than that created by a station operating with maximum facilities at the standard minimum separation distance." *See Petition for Rule Making to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control and Programming*, BC Docket No. 20418, *Notice of Inquiry and Memorandum Opinion and Order*, 52 FCC 2d 618 (1975), *Memorandum Opinion and Order and Notice of Proposed Rule Making*, 63 FCC 2d 840 (1977), *Report and Order*, 81 FCC 2d 233, 238 (1980), *recon. denied, Memorandum Opinion and Order*, 90 FCC 2d 160, 51 RR 2d 959 (1982) (*"VHF Drop-In Proceeding"*), *aff'd sub nom., Springfield Television of Utah, Inc. v. F.C.C.*, 710 F.2d 620, 53 R.R.2d 1139 (10th Cir. 1983).

[3] Population figures are from the 1980 U.S. Census.

[4] BC Docket No. 80-499 sought comments on proposed technical rule changes which "would allow additions to the Table [of Television Allotments] wherever sought, provided any proposed station situated at less than the minimum standard distance specified in our Rules reduced its power radiated in the direction of any existing station by an amount commensurate with the reduction in distance." 83 FCC 2d 51, 52 (1980).

[5] We note that the *Freeze Order* was effective as of July 17, 1987, well before Josephsen filed his petition for rule making.

Therefore, even if Josephsen's proposal met all other technical requirements, it would still be precluded by the effect of the *Freeze Order*.

7. If, however, an allotment of VHF Channel 7 was not precluded by the *Freeze Order*, we would still be unwilling to seek comment on the proposed allotment, as it does not meet the minimum spacing rules established by the Commission. Absent a demonstration of compelling need for departure from established interstation separation standards, the Commission will not grant a waiver of the minimum spacing rules for allotment purposes.[6]

8. While it is true that first local transmission service is a strong public interest, it is not sufficient to warrant a waiver of our minimum spacing rules. Indeed, we have previously rejected short-spaced proposals involving a first local transmission service. As stated in *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990), "[t]he Commission has a strong interest in preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based. Strict adherence to the spacing requirements reflected in the Table is 'necessary...in order to provide a consistent, reliable and efficient scheme of [allotments]' [citing *Millington, Maryland*, 45 RR 2d 1689 (1979)]. "In the rare instances when waivers have been granted at the allotment stage, such as the *VHF Drop-In Proceeding*, the Commission pointed out that the circumstances were unique." We recognize that the four VHF drop-ins we adopt today represent a significant departure from the past and cannot be undertaken lightly. Thus our action follows a careful weighing of all the relevant elements." MM Docket No. 20418, 81 FCC 2d at 235 (1980). Petitioner relies in part on the *VHF Drop-In Proceeding* as precedent for permitting short spaced allotments. However, that case was an omnibus proceeding which involved over ninety requests for short spaced allotments and resulted in only four such allotments being made. At that time the Commission stated that waiver of the spacing rules would only be permitted in cases with special circumstances where there was a large public benefit to be gained at minimal cost.[7] Josephsen has not offered any evidence to show that the public interest benefit of his proposal would exceed the public interest benefit of the minimum spacing rules and thereby warrant waiver of those rules.

9. Although petitioner contends that a population of 46,598 will receive second television reception service from Channel 7, our engineering analysis indicate areas of second service substantially different from those advanced by Josephsen's engineering report. Rather than three separate areas of second reception service indicated by Josephsen, there is only one area which would receive second reception service. Our analysis indicates that the population which would receive second reception service totals 22,175 persons, rather than the 46,598 indicated by Josephsen. While providing additional television service is in the public interest, such benefit, like that of first local service, is not great enough to override the benefits derived from maintaining existing spacing requirements in the Table of Television Allotments in order to prevent, among other things, the potential for harmful interference.[8] Contrary to Josephsen's pleading, the area which would receive second television reception service is directly adjacent to London and could be served by a UHF facility.[9]

10. Petitioner's offer of equivalent protection also fails. We note that BC Docket 80-499 was terminated in January 1990 without prejudice, in light of the ATV proceedings. *See* 5 FCC Rcd 398 (1990). In any event, the use of equivalent protection is generally limited to post allotment requests. Only in those rare instances during a rule making proceeding where it has been determined to be in the public interest to waive the minimum spacing rules has such a tool been used to protect surrounding stations from potential unwanted interference.[10] As stated above, no significant public interest benefit has been shown to justify waiving the minimum spacing requirements and hence no waiver will be granted. Accordingly, after a thorough review of the proposal, the request for a waiver of the minimum spacing rules, and the allotment of Channel 7 to London, Kentucky must be denied.

11. IT IS THEREFORE ORDERED, That the Petition for Reconsideration filed by Thomas J. Josephsen IS DENIED.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

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[6] *See e.g. Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990); *Ventura, California*, 2 FCC Rcd 5882 (1987); *McAlester, Oklahoma*, Mimeo No. 3197, released March 28, 1984; *Millington, Maryland*, 45 RR 2d 1689 (1979); and *Toms River, New Jersey*, 43 FCC 2d 414 (1973). Cases cited by petitioner such as *Pappas Telecasting, Inc.*, 49 FCC 2d 1688 (1981), and *Caloosa Television Company*, 3 FCC Rcd 3656 (1988), involved a change in transmitter site for an existing station, not a request for short spacing at the time of the allotment.

[7] The Commission used specific criteria to select the potential allotment recipients in the omnibus proceeding. Based on that criteria, 78 of the proposals were eliminated and the remaining 18 proposals were then analyzed for technical difficulty, repetition of service, lack of new service to new populations and loss of service to existing populations. The four allotments which eventually resulted had service gains in excess of 500,000 persons, with minimal service interference or loss. *VHF Drop-In Proceeding*, 63 FCC 2d at 863 (1977). *See also McAlester, Oklahoma*, Mimeo No. 3197, released March 28, 1984.

[8] The television allotment priorities, as established by the Commission in the *Sixth Report and Order*, 41 FCC 148 (1952) are 1) to provide at least one television station to all parts of the United States, 2) to provide each community with at least one television station, 3) to provide a choice of at least two television services to all parts of the United States, 4) to provide each community with at least two television stations, 5) any channels remaining unassigned under the foregoing priorities were to be assigned to the various communities on the basis of the size of the population of each city, its geographic location, and the number of television services available from stations in other communities.

[9] However, all television allotments are affected by the *Freeze Order* and therefore, even a UHF facility is unavailable at this time.

[10] In *Oak Beach and Bay Shore, New York*, 2 FCC Rcd 1293 (1987) the minimum spacing rules changed after the time the petition was filed. For this reason, the rules in effect at the time the petition was filed were the minimum spacing rules applied to the allotment. Post allocation waiver of minimum spacing rules generally involve changes in transmitter sites for existing stations where no other suitable site is available. *See Caloosa Television Corp.* 3 FCC Rcd 3656 (1988).

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-86

In the Matter of

Amendment of Section 73.202(b), RM-7961
Table of Allotments,
FM Broadcast Stations.
(Paradise and Fort Bragg
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: August 13, 1992; Released: September 9, 1992

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 2408 (1992), issued in response to a petition for rule making filed by Paradise Broadcasting, Inc. ("petitioner"), licensee of Station KZZP(FM), Channel 244A, Paradise, California, proposing the substitution of Channel 244B1 for Channel 244A at Paradise and modification of its license to specify operation on the higher powered channel. To accommodate its proposal, petitioner also requested the substitution of Channel 228B for Channel 244B at Fort Bragg, California, and modification of the license issued to The Henry Radio Company ("Henry Radio") for Station KLLK-FM.[1] [2] Petitioner filed supporting comments reiterating its intention to apply for Channel 244B1 if allotted to Paradise, as requested. No other comments were received.

2. We believe the public interest would be served by substituting Channel 244B1 for Channel 244A at Paradise, and substituting Channel 228B for Channel 244B at Fort Bragg, California, since it could enable Station KZZP(FM) to provide an enhanced coverage FM service to the community.

3. As indicated in the *Notice*, Channel 244B1 can be allotted to Paradise at the petitioner's suggested site, located 22.3 kilometers (13.9 miles) north of the community.[3] Channel 228B can be allotted to Fort Bragg at the authorized site for Station KLLK-FM.[4]

4. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KZZP(FM) to specify operation on Channel 244B1 in lieu of Channel 244A at Paradise. Since Henry Radio has consented to change its frequency of operation for Station KLLK-FM, we are also modifying its license to specify Channel 228B in lieu of Channel 244B at Fort Bragg. Petitioner is required to reimburse Henry Radio for the costs associated with the modification of its facilities. *See Circleville, OH*, 8 FCC 2d 159 (1967).

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **October 26, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Paradise, California	244B1, 278B1
Fort Bragg, California	228B, 237B1,[5] 253B1

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Paradise Broadcasting, Inc. (BLH-860814KB) for Station KZZP(FM), Paradise, California, IS MODIFIED to specify operation on Channel 244B1 in lieu of Channel 244A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of The Henry Radio Company (BMLH-910318KC) for Station KLLK-FM, Fort Bragg, California, IS MODIFIED to specify operation on Channel 228B in lieu of Channel 244B, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KLLK-FM's license (BMLH-910318KC), except the channel as specified above. Any other changes, except those so

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[1] Station KLLK-FM currently operates on Channel 244A. However, its license was modified to specify operation on Channel 244B in MM Docket No. 90-599. *See* 6 FCC Rcd 5817 (1991).

[2] As stated in the *Notice*, petitioner's proposal included a statement from Brian J. Henry, a general partner of Henry Radio, agreeing to the proposed frequency change for Station KLLK-FM.

[3] Coordinates used for Channel 244B1 are 39-57-29 and 121-42-50.

[4] Coordinates at the authorized site for Station KLLK-FM are 39-27-53 and 123-45-27.

[5] Channel 237B1 was substituted for Channel 237A at Fort Bragg in MM Docket No. 92-25. *See* 7 FCC Rcd 3781 (1992).

specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BMLH-910318KC, except for the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Paradise Broadcasting, Inc., licensee of Station KZZP(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Paradise.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to The Henry Radio Company, Radio Station KLLK-FM, 12 West Valley Street, Willits, CA 95490.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-200

In the Matter of

Amendment of Section 73.202(b), RM-8018
Table of Allotments,
FM Broadcast Stations.
(Bronson and Cross City, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: August 14, 1992; Released: September 9, 1992

Comment Date: November 2, 1992
Reply Comment Date: November 17, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed on behalf of Women in Florida Broadcasting, Inc. ("petitioner"), licensee of Station WDFL(FM), Channel 295C1, Cross City, Florida, proposing the reallotment of Channel 295C1 from Cross City, Florida, to Bronson, Florida, as that community's first local service.[1] Petitioner also seeks the modification of its license accordingly.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules. In this regard, petitioner states that the requested change to Bronson is mutually exclusive with the allotment of Channel 295C1 at Bronson, as it proposes no change in the present reference coordinates for Channel 295C1 at Cross City.[2] Petitioner states the proposed allotment of Channel 295C1 to Bronson will place a 70 dBu signal over the community of Bronson. Petitioner argues that the reallotment of Channel 295C1 to Bronson will result in a preferential arrangement of allotments. Bronson (population 875) would receive its first local transmission service and Cross City (population 2,041) will continue to receive local aural transmission service from Station WDFL(AM).[3] Petitioner advises that while Cross City is currently larger in population, Bronson is growing faster than Cross City. Petitioner states that neither Bronson nor Cross City is located in an urbanized area.

3. An engineering analysis has determined that Channel 295C1 can be allotted to Bronson in compliance with the Commission's minimum distance separation requirements with a site restriction of 48.2 kilometers (30.0 miles) west of the community at the site for vacant channel 295C1 at Cross City. We note that Station WDFL(FM) at Cross City is short-spaced to Station WSNI(FM), Channel 296C1, Thomasville, Georgia. The short-spacing was "grandfathered" under the provisions of Section 73.213.

4. We believe the public interest may be served by proposing to reallot Channel 295C1 from Cross City to Bronson, Florida, since Bronson could receive its first local transmission service. As requested, we will propose to modify petitioner's license for Station WDFL(FM) to specify Bronson as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 295C1 at Bronson or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bronson, Florida	--	295C1
Cross City, Florida	295C1	--

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **November 2, 1992,** and reply comments on or before **November 17, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John M. Spencer
Leibowitz & Spencer
One S.E. Third Avenue, Suite 1450
Miami, Florida 33131
(Counsel for Women in Florida Broadcasting, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the*

[1] Petitioner is presently licensed on Channel 292A at Cross City, Florida. However, it was modified to specify operation on Channel 295C1 by *Report and Order* (MM Docket No. 87-455), 4 FCC Rcd 5599 (1989), *recon. denied*, 7 FCC Rcd 2557 (1992), *app for rev. pend.* An application (BPH-891129IB) to effectuate this upgrade is pending in the FM Branch.

[2] The coordinates for Channel 295C1 at Bronson are North Latitude 29-24-07 and West Longitude 83-08-10.

[3] Population figures are taken from the 1990 U.S. Census.

Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NORTHERN ARIZONA UNIVERSITY FOUNDATION
New Britain, Connecticut — File No. BPLIF-901004DB

CONNECTICUT PUBLIC BROADCASTING, INC.
Farmington, Connecticut — File No. BMPLIF-910114DI

For Construction Permit and License in the Instructional Television Fixed Service on Channels A1 and A2

MEMORANDUM OPINION AND ORDER

Adopted: August 25, 1992; Released: September 8, 1992

By the Commission:

1. The Commission has before it for consideration mutually exclusive applications, each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on channels A1 and A2, to serve the Hartford, Connecticut area. Northern Arizona University Foundation (NAUF) seeks consent to construct a new facility in New Britain, Connecticut on channels A1 and A2. Connecticut Public Broadcasting, Inc. (CPBI), the licensee of ITFS station WHF-271 in Farmington, Connecticut, which operates on channels E1, E2, G1, and G2, seeks consent for the addition of channels A1 and A2. Because a grant of the two channels to CPBI would result in its acquisition of six channels in the Hartford area, CPBI filed a request for waiver of the Commission's four-channel limitation rule, Section 74.902(d).[1] NAUF filed a petition to deny the application, basing its allegations solely upon CPBI's waiver request. CPBI filed an Opposition to the petition, and NAUF responded with a Reply to the Opposition.

PROCEDURE

2. At the outset, NAUF contends that Section 74.902(d) of the Commission's Rules, the four-channel-limitation rule, requires that the Commission first review CPBI's request for a waiver of that rule before employing the mutually exclusive selection procedure. Consequently, NAUF argues, unless the Commission finds that CPBI has justified its need for the additional channels of A1 and A2, the comparative process need not be utilized, and, in essence, CPBI's application is not entitled to further consideration. We agree. Although an applicant's request for a waiver of the four-channel limitation does not affect its basic eligibility as an ITFS applicant, *see Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 F.C.C. 2d 49, 56-63 (1985); 47 C.F.R. §74.932(a), "applications for more than four channels are considered only after passing the waiver hurdle." *Instructional Television Fixed Service - Second Report and Order Reconsideration Reconsidered in MM Docket No. 83-523*, 1 F.C.C. Rcd 24, 25 (1986). Accordingly, once an applicant seeking a four-channel waiver is deemed eligible, the Commission then must evaluate the waiver request and any petition to deny that may have been filed against the request.[2] If the applicant's request fails to meet the burden necessary to obtain the Commission's grant of the waiver, that applicant will be dismissed, but if the Commission finds the request justified, the application, along with all other eligible mutually exclusive applications, will be evaluated under the comparative selection procedure as outlined in Section 74.913. However, the applicant seeking the waiver request will be clearly disadvantaged in that process by the two-point preference for applicants whose proposal would result in four or fewer ITFS channels. 47 C.F.R. §74.913(b)(3). Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we will first ascertain the basic eligibility of NAUF and CPBI, and then review CPBI's four-channel waiver request.

BASIC ELIGIBILITY

3. NAUF is qualified to be an ITFS licensee. It is a nonprofit organization whose purposes are educational and include providing educational and instructional television material to accredited institutions. The four receive sites it proposes to serve, a seminary, a college and two parochial schools, have each submitted letters indicating a familiarity with NAUF's proposed services and an intention to receive and utilize those services in the curriculum.[3] In addition,

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[1] Section 74.902(d) generally limits a licensee to the assignment of no more than four channels for use in a single geographic area of operation.

[2] A petition to deny filed against a mutually exclusive applicant for any other reason will be considered only if that applicant is the tentative selectee in the comparative selection procedure. *See Second Report and Order*, 101 F.C.C. 2d at 76; 47 C.F.R. §74.912(c). CPBI contends that because Section 74.912(c) provides for consideration of petitions to deny only against tentative selectees, we must therefore consider the waiver request and accompanying petition after the comparative process. Yet, because procedure and our past practice require that we review waiver requests prior to the comparative process, *see, e.g., Milwaukee Regional Medical Instructional Television Station, Inc.*, 2 F.C.C. Rcd 1472, 1473 (1987), it is only equitable to consider simultaneously with that review any petitions to deny the waiver request. Accordingly, in view of the fact that the sole basis of NAUF's petition to deny is the four-channel waiver request, we will consider its allegations in tandem with our review of CPBI's waiver request.

[3] NAUF amended its application on May 13, 1991 to add three receive sites. Although no letters of intended use were submitted by these sites, NAUF's accreditation has been perfected by the letters of intended use submitted by the four schools included in the original application. However, because the amendment was submitted after the "B" cut-off date, April 15, 1991, if the comparative process were to result in a tie, NAUF would be unable to include students at those receive sites in its enrollment figures, which would be the basis of a tie breaker. *See* 47 C.F.R. §74.913(d).

NAUF has demonstrated the establishment of a local program committee, a requirement of nonlocal applicants.[4] *See* 47 C.F.R. §74.932(a)(5).

4. CPBI, a nonprofit educational corporation and ITFS licensee, is also qualified to be an ITFS licensee. Its purposes are educational and include providing educational and instructional material to accredited institutions which operate under the auspices of Connecticut's Department of Education. The Commissioner of Education has submitted a letter indicating the Board's current utilization of CPBI programming in its school districts and its intention to receive and incorporate the proposed services, which will facilitate state-mandated programs, within the curricula of 26 public schools.[5]

FOUR-CHANNEL WAIVER REQUEST

5. An applicant seeking waiver of the four-channel limitation rule must demonstrate how the additional channels will be used for traditional ITFS purposes and why present channel capacity is insufficient to accommodate the additional needs. *Instructional Television Fixed Service - Report and Order in MM Docket 83-523*, 98 F.C.C. 2d 925, 933 (1984); *Second Report and Order*, 101 F.C.C. 2d at 76-78. The waiver burden is high, particularly in areas where a large demand for channels exists. *Id.* at n.36; *see also School District No. 1 in the City and County of Denver*, 3 F.C.C. Rcd 6392, 6393 (1988).

6. In its waiver request and Opposition, CPBI notes that, as the entity designated by the governor of Connecticut as the State Telecommunications Authority, CPBI is attempting to construct a statewide ITFS system which will provide instructional services to every school district in the state. It first entered the ITFS field in a cooperative venture with the Connecticut Regional Community and Technical Colleges, and commenced operation in 1983 on WHF-271, operating first on channel E1. The station now operates on channels E1 and E2, serving the Community-Technical Colleges, and on channels G1 and G2, serving Connecticut's Department of Education. Channel E1, according to a schedule submitted by CPBI, transmits educational programming seven days a week, 365 days a year, with uninterrupted programming from 9:00 a.m. through 10:30 p.m., while channel E2 provides 28 average hours per week, generally between 9:00 a.m. and 5:00 p.m., Monday through Friday.[6] Station WHF-271's programming, a mix of courses for college credit and educational teleconferencing, together with that of CPBI's WHF-277 and WHF-270, provide a statewide service to cable systems and Community College branch campuses. As for the channels serving the Department of Education, channel G1, as indicated on the schedule submitted in the Opposition, airs educational programming 25 hours per week, generally between 9:00 a.m. and 2:00 p.m., Monday through Friday, as does channel G2, 15 hours per week, generally between 10:00 a.m. and 2:00 p.m., with a noon break, Monday through Friday. These two channels, which additionally transmit teacher training and instructional material, CPBI notes, are only the first of a proposed network to serve Kindergarten through Grade 12 classrooms throughout the state. Moreover, CPBI states that it proposes to expand this programming to more than 30 additional hours per week, primarily during the evening hours, when most of the channels are not utilized by the students now served. This expanded service, according to letters included in the Opposition and submitted by the Connecticut Department of Correction, the State Commission on Fire Prevention and Control, and the Connecticut State University, will include programming, much of which is formal educational, that targets the various constituencies of these state agencies and institutions.

7. CPBI's acquisition of the additional channels A1 and A2, according to a letter submitted by the Commissioner of Education on behalf of CPBI's application, will provide the means for the Department of Education to implement a remedial education project for its 13 urban districts, which are responsible for educating more than 80 percent of the state's minority students. This "urban focus" project will provide the districts with training materials not only for teachers and students, but for parents, whose programming needs are best served in the evening. As a result, notes CPBI, programming on channels A1 and A2, comprising an average 8.5 hours of formal educational programming and an average 22 hours of other ITFS programming per channel per week, will supplement rather than replace that already transmitted for the Depart-

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[4] We note that with the July 1986 expiration of the "local priority period," a one-year period when only local entities were eligible to apply for and receive ITFS authorizations, unassigned channels became available to all eligible applicants, including national entities such as NAUF. *See Second Report and Order*, 101 F.C.C. 2d at 57; *Instructional Television Fixed ServiceSecond Report and Order Reconsidered in MM Docket No. 83-523 (Second Report and Order Recon.)*, 59 R.R.2d 1355, 1358 (1986).

[5] Because CPBI has been designated State Telecommunications Authority by the governor of Connecticut, it qualifies as the equivalent of a state educational television (ETV) commission, and a letter from each of the 26 proposed receive sites is not required. The letter from the Commissioner of Education regarding CPBI's facilitation of state-mandated programs is sufficient to perfect CPBI's accreditation. *See Second Report and Order Recon.*, 59 R.R.2d 1355, 1368-1369 (1986); 47 C.F.R. 74.932(a)(4).

[6] With regard to the waiver request, we rely upon the schedules for channels E1, E2, G1, and G2 submitted by CPBI in its Opposition despite NAUF's two-pronged challenge to these supplemental schedules. First, NAUF argues that CPBI should not be permitted to supplement its waiver request via its Opposition of April 30, 1991, filed more than two weeks after the "B" cut-off date, April 15, 1991, when, it alleges, all amendments to the applications were due. Second, NAUF notes that the greater amount of programming included in CPBI's newly submitted schedules is based on the week of May 6-10, 1991, rather than the lower average weekly hours of programming indicated in the application. We agree that minor amendments resulting in a comparative advantage must be filed before the "B" cut-off date, *Second Report and Order*, 101 F.C.C. 2d at 74, but here we rely upon the supplemental schedules only for the purpose of evaluating the four-channel waiver request, an analysis that involves no comparison with NAUF. In our comparative process, however, we will look to CPBI's original application to determine merit points for programming for channels A1 and A2. As for the greater amount of programming reflected in the May 6-10, 1991 supplemental schedule, we accept the schedule as an accurate representation of CPBI's programming, submitted in response to NAUF's concern that the original schedule contained no specific hours of operation, based upon the declaration by CPBI's vice president that the facts are true and correct.

ment of Education on channels G1 and G2. Because it is essential that the bulk of this programming air between 9:00 a.m. and 4:30 p.m. weekdays, CPBI's present channel capacity is unable to accommodate the Department of Education's urban project.

8. We are persuaded that CPBI has demonstrated that the requested channels are necessary to provide the wide range of educational and instructional programming proposed. We find that the schedules and information submitted by CPBI indicate that at least five of the six channels will be used for substantial portions of the school day and all will be used simultaneously for substantial portions of the day.[7] Although channel E1, which provides an average 105 hours per week of programming, repeats its schedule throughout the day, we find that such repetition is reasonable. Moreover, based on CPBI's representations that it intends to provide programming in order to satisfy the educational needs of prison inmates, firefighters and students of one of the state's universities, we accept CPBI's assertion that the amount of programming will increase on all channels in the near future. Accordingly, it is apparent that a lesser number of channels would be insufficient to accommodate CPBI's needs. Further, NAUF's allegation that CPBI's burden is even greater since all ITFS channels in the Hartford area are either licensed or subject to pending applications does not diminish CPBI's demonstration of need for additional channels.[8] *See School District No. 1 in the City and County of Denver*, 3 F.C.C. Rcd at 6394. A waiver of the four-channel limitation is justified, and CPBI's application is eligible to compete for channels A1 and A2 in our comparative process for mutually exclusive applications.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

9. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards predetermined merit points based on five criteria deemed to be most relevant to selecting the applicant best qualified to provide the service for which the ITFS spectrum has been established. *Second Report and Order*, 101 F.C.C. 2d at 65-72; 47 C.F.R. §74.913. First, four points are awarded to local applicants.[9] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[10] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.[11]

10. Under this comparative selection process, NAUF and CPBI are awarded points based on the following criteria:

> **Localism.** NAUF, based in Flagstaff, Arizona, seeks to serve the Hartford, Connecticut area. Because its headquarters is not located within the area it proposes to serve, NAUF is not entitled to points for being a local applicant. CPBI is based in Hartford and proposes service to Hartford and vicinity, qualifying it as a local applicant. Accordingly, CPBI is entitled to four points.
>
> **Accreditation.** Although they propose to serve accredited institutions, a factor satisfying the basic eligibility of an applicant, neither NAUF nor CPBI are accredited entities in their own right, the status

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[7] The crux of NAUF's petition to deny and reply is that CPBI has demonstrated that only channel E1, operating 365 days a year and 13.5 hours a day, is fully utilized. Yet, full utilization of currently assigned channels is not a prerequisite to an applicant's request for additional channels. *See Second Report and Order*, 101 F.C.C. 2d at 77. There are several factors we consider in our *ad hoc* approach to requests for waiver of the four-channel limitation, including the amount of use of the currently licensed channels and the amount of proposed use of each requested channel during the school day, simultaneous use of the channels for a substantial portion of the day, and justified repetitiousness of the programming. *See id.; School District No. 1 in the City and County of Denver*, 3 F.C.C. Rcd at 6393-6394.

[8] NAUF also contends that if CPBI is granted the additional channels, the schools within the Archdiocese of Hartford, which NAUF proposes to serve, will be foreclosed from receiving CPBI's instructional programming. In response to NAUF's concern, CPBI and the Department of Education, according to a letter signed by the Department's assistant director for curriculum development and included in the Opposition, have agreed to make their programming available to all non-public as well as public schools in the state. Moreover, we note that the Archdiocese of Hartford has pending before the Commission an application for channels B1-B4 in the Hartford area, providing a further potential source of programming access for this educational entity. Although NAUF's application here is its only opportunity to become a licensee in the Hartford area, NAUF is still free to cooperate with local educational entities in developing, producing and supplying educational programming for them. *See Second Report and Order*, 101 F.C.C. 2d at 57-58.

[9] A "local" applicant generally is an institution or organization that is physically located in the community, or metropolitan area, where service is proposed. *Second Report and Order*, 101 F.C.C. 2d at 59; 47 C.F.R. §74.932, Note 1.

[10] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. §74.913(b)(4).

[11] If the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional*

necessary for earning merit points in the comparative process.[12] Therefore, NAUF and CPBI are not entitled to the three points for accredited applicants.

Four-Channel Limitation. NAUF has no other ITFS facilities in the Hartford area, and its present application seeks the use of only two channels. Thus, NAUF is entitled to the two points for applicants remaining within the four-channel limitation. CPBI is the licensee of ITFS station WHF-271, which presently operates channels E1, E2, G1, and G2. Its present application for two additional channels, if granted, would result in its acquisition of six channels. Consequently, CPBI is not entitled to any points.

Instructional Programming. NAUF's illustrative schedule and programming grid in Section IV of Form 330 both propose an average of 20 hours of formal educational programming per channel per week. Thus, NAUF is entitled to no points for instructional programming. CPBI's illustrative schedule, included in its application, proposes an average of 26.4 hours of non-formal ITFS programming per channel per week, an amount that entitles CPBI to no points.[13]

E- and F- Channel Group Relocations. NAUF is not the current licensee of an E or F channel and is not seeking a relocation of such facilities. Thus, it is not entitled to the one point for such applicants. Although CPBI is the current licensee of channels E1 and E2, its present application is not necessitated by a need to vacate those facilities, and it is therefore not entitled to the one point for relocation.

Total. NAUF is entitled to points for observing the four-channel limitation, for a total of two points. CPBI is entitled to points for being local, for a total of four points. Thus, the selectee is CPBI.

OTHER MATTERS

11. CPBI does not propose to lease its excess capacity for non-ITFS use, as permitted by Section 74.931. Further, there are no petitions to deny CPBI's application, and we find CPBI to be fully qualified.

12. Accordingly, IT IS ORDERED, That the petition to deny filed by Northern Arizona University Foundation against the four-channel waiver request of Connecticut Public Broadcasting, Inc. IS DENIED.

13. IT IS FURTHER ORDERED, That the request by Connecticut Public Broadcasting, Inc. for waiver of the four-channel limitation, Section 74.902(d) of the Commission's Rules, IS GRANTED.

14. IT IS FURTHER ORDERED, That the application of Connecticut Public Broadcasting, Inc. for a license for channels A1 and A2 in the Instructional Television Fixed Service in Farmington, Connecticut (BMPLIF-910114DI) IS GRANTED.

15. IT IS FURTHER ORDERED, That the application of Northern Arizona University Foundation for a license for channels A1 and A2 in the Instructional Television Fixed Service in New Britain, Connecticut (BPLIF-901004DB) IS DENIED.

16. The staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Television Fixed Service - Third Report and Order in MM Docket No. 83-523, 4 F.C.C. Rcd 4830 (1989), and Section 74.913(d) of the Commission's Rules.

[12] CPBI asserts that its designation by the governor as State Telecommunications Authority and its collaboration with the Department of Education merits accreditation points. We disagree. The policy of awarding points for accreditation derives from the Commission's belief that ITFS applicants which are direct providers of education are most likely to devote the necessary academic and staff resources to the development of educational programming to comply with prescribed academic standards. *Second Report and Order Recon.*, 59 R.R. 2d at 1370. Accordingly, state educational television commissions warrant accreditation points only where they are agencies of a state's formal education department or where they are a directly controlled arm of such an agency. *Id.* at 1371. CPBI, which is not under the control of Connecticut's Department of Education but merely cooperates in the transmission of that agency's instructional programming, is entitled to no accreditation preference.

[13] CPBI argues that it is entitled to one programming point. However, because CPBI's illustrative schedule does not indicate which programs are for formal education, those for which students earn credit, we will consider all of its programming as non-formal ITFS programming for the purpose of determining merit points. However, CPBI's programming grid, which reports an average of 8.5 hours of formal educational programming per channel per week and 22.1 hours per week of other ITFS programming per channel per week, is sufficient to satisfy the formal educational programming requirements of Section 74.931(a). Yet, the inconsistencies between CPBI's schedule and programming grid require us to look to the lesser amount reported, that which is reported on the schedule, and to find that no programming points are to be awarded. Even if we were to rely on the programming grid alone, however, CPBI would not be eligible for programming points.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

RED ROCK BROADCASTING, INC. File No. ARN-880602NE

For a Construction Permit
for a new FM Radio Station
St. George, Utah

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1992; Released: September 10, 1992

By the Commission:

1. The Commission has before it: (1) an application for review filed on February 4, 1991, by Red Rock Broadcasting, Inc. ("Red Rock"), an applicant for a construction permit for a new FM broadcast facility at St. George, Utah; (2) an opposition filed on February 19, 1991, by a mutually exclusive applicant, EAR, Inc. ("EAR"); and (3) Red Rock's reply filed on March 1, 1991. Previously, by letter dated December 27, 1990, the Chief, Audio Services Division, Mass Media Bureau ("Bureau"), acting by delegated authority, denied Red Rock's June 15, 1989, petition for reconsideration of the staff return of its application and granted the competing application of EAR. Red Rock now seeks Commission review of the return of its application. We deny Red Rock's application for review for the reasons set forth below.

BACKGROUND

2. On June 2, 1988, Red Rock filed an application for a new commercial FM station at St. George, Utah. A preliminary engineering study revealed that Red Rock's proposal violated Section 73.207 of the Commission's Rules in that it was 1.2 kilometers short-spaced to an adjacent Class C1 allotment in Kingman, Arizona. Red Rock had requested a waiver of Section 73.207 of the Rules. However, since the competing applicant, EAR, proposed a fully-spaced site, the staff, citing *Donovan Burke*, 104 FCC 2d 843(1986), denied the waiver request and returned Red Rock's application as unacceptable for filing.

3. On June 15, 1989, Red Rock filed a petition for reconsideration alleging that the site which EAR originally proposed was no longer suitable because the FAA had determined that the site constituted a hazard to air navigation. Red Rock argued that its application therefore must be reinstated and designated for hearing since there was now a substantial and material question of fact concerning the feasibility of EAR's site, citing *Clearlake Broadcasting Co.*, 47 Fed. Reg. 47931 (MM Bur. 1982). Red Rock also argued that its application fell within the *de minimis* exception set forth in *Kenter Broadcasting Co.*, 62 RR 2d 1573 (1986), *aff'd sub nom. Kenter v FCC*, 62 RR 2d 1579 (D.C. Cir. 1987). Finally, Red Rock contended that the public interest would be served by grant of its requested short-spacing waiver because the Commission would then be able to select between two applicants in issuing the construction permit, rather than issuing it to EAR out of default.

4. In denying the petition for reconsideration, the Bureau rejected the public interest showing made by Red Rock in its application. Specifically, the Bureau concluded that Red Rock's claim that operation from the short-spaced site would enable it to provide new FM service to a given population was unavailing because the Bureau found that the area proposed to be served was currently well served. Additionally, the Bureau rejected Red Rock's argument that there had been a lack of sufficient time to locate a fully-spaced site, noting that the competing applicant, EAR, had succeeded in finding two fully-spaced sites. The Bureau also rejected Red Rock's allegations concerning EAR's originally proposed transmitter site, which had subsequently been found by the FAA to constitute an air hazard. Since, upon receiving the air hazard determination EAR, for good cause, had amended its application to specify another fully-spaced site, the Bureau held that Red Rock's allegations about EAR's original site were without merit. The Bureau concluded that Red Rock had failed to make an adequate public interest showing and affirmed that Red Rock's application was properly returned as unacceptable for filing. Thus, Red Rock's petition for reconsideration was denied and the EAR application was granted.[1]

5. Red Rock now seeks review of the Bureau's action. Red Rock raises three questions for review: (1) whether the Bureau erred by imposing too rigorous a standard on its waiver request by relying on precedent concerning major short-spacing waivers rather than *de minimis* waivers; (2) whether the Bureau erred in rejecting Red Rock's showing that EAR's original proposal lacked a feasible site, and (3) whether the Bureau abused its discretion by accepting EAR's curative amendment for good cause but subsequently refusing to accept Red Rock's amendment demonstrating that Red Rock's short-spacing had been rendered moot by a subsequent allotment proceeding. Red

[1] On July 19, 1990, after the denial of its waiver and return of its application, Red Rock filed an untimely amendment, styled "Information Statement," which noted that on May 10, 1990, the Commission granted the application of New West Broadcasting Systems, Inc., the licensee of station KGMN(FM), Kingman, Arizona, for a construction permit to operate on Channel 260C2 instead of the originally requested allotment of 260C1. Red Rock contended that this action thus eliminated the short-spacing in question. In denying the petition for reconsideration, the Bureau also rejected the proffered amendment, noting that in accordance with the FM "hard look" procedures established in the *Report and Order* in MM Docket 84-740, 50 Fed. Reg. 19936 (1985) (*"Report and Order"*), the Commission must find Red Rock's application acceptable as of the last date for filing amendments as a matter of right. The Bureau further noted that to consider a change in circumstances which occurred after the filing of both the Red Rock and EAR applications would be patently unfair to EAR, whose application fully complied with our acceptability requirements as of the amendment of right date, citing *PrimeMedia Broadcasting*, 3 FCC Rcd 4293 (1988); *Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); and *Domega Broadcasting Corporation*, 4 FCC Rcd 1450 (1989).

Rock thus seeks reversal of the denial of its petition for reconsideration; grant of its waiver request and acceptance of its application; rescission of the grant of EAR's application; and designation of its application for comparative hearing with EAR.

DISCUSSION

6. Red Rock's application for review of the return of its application essentially restates the arguments made in its petition for reconsideration. We have carefully reviewed the Bureau's disposition and find no reason to disturb its ruling on that matter.

7. Red Rock argues that the Bureau applied an incorrect standard in denying its short-spacing waiver request. We disagree. The Bureau thoroughly reviewed Red Rock's overall showing in support of its waiver request and correctly determined that "[Red Rock] lack[ed] an adequate public interest showing and waiver justification." Accordingly, the Bureau properly concluded that Red Rock failed to demonstrate that the public interest would be served by grant of its waiver request and returned Red Rock's application as unacceptable for filing. To the extent that Red Rock suggests that its public interest showing met the standard for *de minimis* waivers set forth in *The Baltimore Radio Show*, 5 FCC Rcd 3712 (1974), we reject that argument. There, the public interest showing warranting a waiver entailed the avoidance of potentially serious environmental problems. However, in this case, Red Rock's showing of service to persons not shown to be unserved or underserved and its provision of a comparative choice does not equate with the public interest showing found to be sufficient in *The Baltimore Radio Show*. Red Rock's citations of *Cotton Broadcasting Co.*, 104 FCC 2d 473, 477 (Rev. Bd. 1986), *modified on other grounds*, 4 FCC Rcd 1781 (1989) and *Barton Broadcasting Co.*, 60 RR 2d 322, 326-27 (Rev. Bd. 1986) are inapposite. Those cases dealt with new and increased service in the comparative coverage evaluation of mutually exclusive applicants and did not involve a public interest showing in support of a short-spacing waiver request.

8. We also reject Red Rock's argument that grant of its waiver request is in the public interest because it would preserve a comparative choice. It is clear that "[t]emporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." *See Chudy Broadcasting Corporation*, 58 RR 2d 133, 134 n.7 (1985). Here, Red Rock's proposal was defective and its consideration would be inconsistent with the principles underlying the "hard look" policy.

9. Red Rock's contentions that the Bureau erred in rejecting questions about EAR's site and in denying it comparative consideration under the *Clearlake* "exception" are also without merit. That exception provides that where a short-spaced applicant raises a question as to the *technical* feasibility of all mutually exclusive applicants proposing fully-spaced sites, appropriate technical issues will be specified as to the fully-spaced applicants and the short-spaced applicant will be designated for hearing with a short-spacing issue. In such situations, action on the short-spaced applicant's waiver request would be deferred until after a determination is made as to whether the challenged sites comply with the Commission's technical requirements. *See North Texas Media and Donovan Burke*. The Bureau fully considered the applicability of the *Clearlake* exception to the instant case. Here, unlike the facts in *Clearlake*, which involved city coverage and related line-of-sight questions with respect to an application for which all opportunities to amend had passed, Red Rock's allegations did not relate to technical feasibility of EAR's site, but instead to the FAA's air hazard determination concerning EAR's original site. In fact, EAR's application was found to be acceptable for filing as of the last date for filing amendments as a matter of right, September 8, 1988. The Bureau, relying on a long standing Commission rule and case law, found good cause for EAR's subsequent amendment after the FAA had determined that the original site would constitute an air hazard. In rejecting Red Rock's allegations with respect to EAR's original site, the Bureau properly concluded that Red Rock had failed to raise a substantial and material question of fact concerning the technical feasibility of EAR's proposed operations at the amended site, and properly concluded that this determination made the *Clearlake* exception inapplicable.

10. Finally, Red Rock alleges that the Bureau abused its discretion by accepting, for good cause, EAR's amendment filed after the amendment as of right period specifying a new site, but refusing to accept Red Rock's untimely curative amendment. We disagree and find the Bureau's action to be correct. As noted above, pursuant to the Commission's "hard look" procedures,[2] the benchmark for determining the acceptability for filing of an application is the last date for filing amendments as a matter of right. As of that date, Red Rock's application was short-spaced and thus not acceptable for filing, whereas EAR's application was fully-spaced and acceptable for filing. Moreover, Red Rock's amendment unlike EAR's did not fall within the "good cause" exception provided for in our rules for the acceptance of late filed amendments. Accordingly, since we have concluded that EAR's amendment was properly accepted, whereas Red Rock's attempted curative amendment was properly rejected, there was no abuse of discretion. *See Donovan Burke*. Nor were the Bureau's actions inconsistent with *Melody Music, Inc. v. FCC*, 120 U.S. App. D.C. 245, 345 F. 2d 994, 7 RR 2d 2001 (1966), since Red Rock and EAR were not similarly situated.

11. ACCORDINGLY, IT IS ORDERED, That the application for review filed on February 4, 1991, by Red Rock IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[2] The Commission recently modified the "hard look" processing rules, and made these rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd _____ (adopted July 16, 1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers	**CC Docket No. 87-463**
Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers	**CC Docket No. 89-624**

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 1992; Released: September 9, 1992

By the Commission:

I. INTRODUCTION

1. On February 1, 1990, Consumer Coalition[1] petitioned for reconsideration of our decision, in the *Interim Prescription Order*, to prescribe an interim, overall rate of return of 12% for the interstate access services of local exchange carriers (LECs).[2] That interim prescription was based on our determinations that the then current authorized rate of return of 12% remained within a zone of reasonableness, and that it would be just and reasonable to retain that rate of return pending completion of the 1990 represcription proceeding.[3] Consumer Coalition challenges these determinations, arguing that the *Interim Prescription Order* is internally inconsistent and offers no rational basis for the interim prescription. Consumer Coalition also asks us to impose an accounting order until we are able to prescribe an appropriate rate of return and award refunds if warranted. For the following reasons, we deny Consumer Coalition's petition.

II. BACKGROUND

2. In 1986, after consideration of a full record, the Commission prescribed an overall rate of return of 12% for LEC interstate access.[4] Although this prescribed rate of return was initially to be in effect for 1987-1988, successive extensions kept that 12% rate of return in effect through December 31, 1989.[5] On September 21, 1989, the Common Carrier Bureau issued a Notice seeking comment on whether the current 12% prescription, should be extended or revised temporarily beyond December 31, 1989.[6] The *Notice* requested interested parties "to submi, financial data and other comments addressed to the question whether the conditions which supported the 1986 prescription have changed so substantially as to require revision of that prescription."[7]

3. In response to the *Notice*, twenty-one parties filed comments or reply comments. The Regional Bell Holding Companies (RHCs) submitted the cost of capital information required by Part 65 of our rules,[8] but took issue with its value in determining the need for a new rate of return. The RHCs and the United States Telephone Association (USTA) provided a substantial amount of other data and analyses assertedly showing that, if a new rate of return were necessary, it should be at or above the 12% rate of return then in effect.[9] Other parties, such as Consumer Coalition, argued that the rate of return should be lowered and presented further data and analyses in support of their position.[10] The record was replete with conflicting positions and supporting material thereon.

4. In the *Interim Prescription Order*, we recognized that the parties had raised extremely complex issues whose resolution would require detailed and complete analysis. We were concerned that the abbreviated schedule under which this interim proceeding was conducted, although necessitated by the expiration of the prior prescription, did not provide sufficient time to perform such an extensive analysis. Thus, we determined that "unless we [found] that the 12% prescription [was] outside the broad zone of reasonableness, the public interest [would] best be served

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[1] Consumer Coalition is made up of three entities: Consumer Federation of America, International Communications Association, and MCI Telecommunications Corporation.

[2] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers; Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order*, 5 FCC Rcd 197 (1989) (*Interim Prescription Order*).

[3] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, *Order*, 5 FCC Rcd 7507 (1990) (*1990 Represcription Order*), *recon.*, 6 FCC Rcd 7193 (1991) (*1990 Represcription Reconsideration Order*), *petitions for review docketed sub nom.*, Illinois Bell Telephone Co., *et al.* v. FCC, No. 91-1020 (D.C. Cir. filed January 11, 1991).

[4] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase III, FCC 86-354, *Report and Order*, 51 Fed. Reg. 32920 (September 17, 1986), *recon. denied*, 2 FCC Rcd 5636 (1987).

[5] *See* Deferral of Rate of Return Represcription Filing Pursuant to Section 65.102(c), *Memorandum Opinion and Order*, 4 FCC Rcd 3920 (Com.Car.Bur. 1989); Deferral of Rate of Return Represcription Filings Pursuant to Section 65.102(c) of the Rules, *Memorandum Opinion and Order*, 3 FCC Rcd 7220 (Com.Car.Bur. 1988); Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, *Memorandum Opinion and Order*, 3 FCC Rcd 1697 (1988).

[6] Comment Sought on Extension or Revision of the Current Rate of Return Prescription for Interstate Services of Local Exchange Carriers, *Public Notice*, 4 FCC Rcd 7051 (Com.Car.Bur. 1989) (*Notice*). This Notice responded to an October 1988 petition, *Interim Prescription Order*, 5 FCC Rcd at 197, para. 4.

[7] *Notice*, 4 FCC Rcd at 7051.

[8] 47 C.F.R. Part 65.

[9] *See Interim Prescription Order*, 5 FCC Rcd at 199-201, generally.

[10] *See id.*

by continuing the current prescription in effect until we [had] carried out a represcription proceeding using the procedures contained in Part 65."[11]

5. The dispute between the parties focused on the LECs' cost of equity, and the record in this regard presented alternative methodologies that introduced issues that this Commission had not previously addressed. Our examination of the record made clear that we would have to resolve a host of detailed technical arguments before using any cost of equity methodology to prescribe a rate of return. The abbreviated time schedule did not allow us to do that. Moreover, we found the record less than complete in a number of key areas.[12] This was significant because, as we explained, the Commission has been reluctant to change the rate of return based on a change in cost of equity on less than a full record.[13] In these circumstances, we found it reasonable to rely on the undisputed data on interest rate trends and state rate of return allowances. We found that these data indicated that the 12% rate of return remained within a broad zone of reasonableness.[14] We prescribed on an interim basis a 12% rate of return effective January 1, 1990, pending completion of a full represcription proceeding in 1990.

6. On February 1, 1990, Consumer Coalition petitioned for reconsideration of the *Interim Prescription Order*. Rochester Telephone Corporation (Rochester) filed an opposition to Consumer Coalition's petition. Subsequently, we completed a full represcription proceeding in 1990 pursuant to our Part 65 rules. We prescribed a new overall rate of return for LEC interstate access of 11.25%. We reached this conclusion only after a comprehensive and exhaustive review of a record that included considerable information on cost of equity that was not in the record in the interim represcription proceeding. The 11.25% authorized rate of return became effective on January 1, 1991.[15]

III. DISCUSSION

A. Parties' Positions

7. Consumer Coalition asks this Commission to reconsider its interim prescription of 12%.[16] Consumer Coalition essentially argues that an overall rate of return of 10.3, rather than 12%, should have been prescribed. In support of its position Consumer Coalition argues that specific aspects of the *Interim Prescription Order* are arbitrary and capricious.

8. First, Consumer Coalition states that our finding that the 12% rate of return was still within a zone of reasonableness was undermined by our finding that we could not select precisely where within the zone of reasonableness the best possible balance between shareholder and ratepayer interests, as a policy matter, would be achieved.[17] Consumer Coalition labels these findings internally inconsistent. Essentially, Consumer Coalition argues that if this Commission could not reach a final determination on the "most appropriate rate of return" for LEC cost of capital from the factors it relied upon in finding that a 12% rate of return remained within a zone of reasonableness, then such factors provide an insufficient basis for finding that a 12% rate of return was reasonable.[18]

9. Second, Consumer Coalition argues that the reasoning underlying our decision is logically insufficient, departs from prior Commission practice, and ignores uncontroverted evidence.[19] Consumer Coalition maintains that our reliance upon the abbreviated nature of the proceeding, the difficulty and prematurity of resolving methodological disputes on the basis of a mixed and incomplete record, and the Commission's alleged past practice of not altering the rate of return on less than a full record is flawed, particularly in light of Consumer Coalition's assertedly strong evidentiary showing of the need to lower the rate of return.[20] Consumer Coalition also calls for imposition of an accounting order.[21]

10. Rochester argues that the Commission correctly continued the effectiveness of the 12% overall rate of return.[22] Rochester disagrees that the decision contained internal inconsistencies, and argues that the record supports the Commission's determination.[23]

B. Discussion

11. Consumer Coalition's first argument assumes that if the record as a whole does not provide a sufficient basis to select the precise rate of return that achieves the best possible balance between shareholder and ratepayer interests, the record also does not provide a sufficient basis for determining whether the then current rate of return remains within the zone of reasonableness. We disagree. While striking the best possible balance between investors and ratepayers requires us to address definitively difficult methodological issues typically raised in a represcription proceeding, finding that a particular rate of return lies within the broad "zone of reasonableness" does not. As we stated in the *Interim Prescription Order*, although "interest rates cannot be used to calculate just and reasonable rates of return in any simple fashion, they do serve as indicators of trends in equity capital costs."[24] Uncontroverted evidence revealed that interest rates had been, and remained, relatively stable over the period in which the 12% rate of return was in effect, including the period during which the interim prescription proceeding occurred. We found that this trend indicated that this rate of return remained within the zone of reasonableness. Moreover, uncontroverted evidence also showed that a number of states continued to allow rates of return of around 12%. This state rate of return data reinforced our finding that 12% remained within the zone of reasonableness. While these data were not sufficient to allow us to adjust the

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[11] *Id.* at 201-202, para. 40.
[12] *E.g., id.* at 202, para. 42.
[13] *Id.* at 202, para. 44. *See also* American Telephone and Telegraph Co., Charges for Interstate Telephone Service, *Order*, 51 FCC 2d 619 (1975) (*1975 Order*), *recon. denied*, 53 FCC 2d 1073 (1975); 57 FCC 2d 960 (1976).
[14] *Interim Prescription Order* 5 FCC Rcd at 202, para. 45.
[15] *1990 Represcription Order*, 5 FCC Rcd at 7507, para. 1.
[16] Consumer Coalition Petition at 7-23.
[17] *Id.* at 7, *citing Interim Prescription Order*, 5 FCC Rcd at 202, para. 45.
[18] Consumer Coalition Petition at 9.
[19] *Id.* at ii, 9-20.
[20] *Id.* at 23.
[21] *Id.* at 21-23.
[22] Rochester Opposition at 8-12.
[23] *Id.* at 9-12.
[24] *Interim Prescription Order*, 5 FCC Rcd at 202, para. 45.

prescription up or down, they were sufficient to justify an interim finding that 12% remained within the zone of reasonableness. There was no inconsistency in our reasoning.

12. Consumer Coalition's second argument is essentially that our decision is flawed. Consumer Coalition cites as a flaw this Commission's asserted failure to accord sufficient weight to Consumer Coalition's submissions. Consumer Coalition assumes that those submissions are based on an irrefutable cost of equity methodology that required an overall rate of return as low as 10.3.

13. Consumer Coalition's assumption fails to recognize that ratemaking is not an exact science; it requires the exercise of agency judgment and expertise. Thus, regulatory agencies are not bound by particular methodologies or procedures in their ratemaking process. Moreover, agencies are afforded wide latitude to make pragmatic adjustments called for by particular circumstances.[25] However, the legal standards require regulatory agencies to ensure that rates are "just and reasonable" which involves balancing investor and consumer interests.[26] It is under these strictures that we prescribed the interim rate of return.

14. Consumer Coalition's attack on the Commission's reasoning focuses on individual aspects of our decision, instead of all the factors considered together in our decision. This we believe is in error because the reasonableness of our decision can only be evaluated by examining all of the factors together. We restate them briefly. First, the prescribed rate of return was set to expire December 31, 1989. Without a prescribed rate of return, a regulatory void would have occurred during which all parties involved potentially could suffer harm. For instance, if the prescription expired, carriers would have been free to file rates at any level, potentially disadvantaging ratepayers. Second, the prescription was for an interim period only, until completion of the 1990 represcription proceeding.[27] The interim nature of the action militated against adjusting the prescribed rate of return up or down absent persuasive uncontroverted evidence of a change in the cost of capital. Moreover, the extension of the 12% rate of return prescription on an interim basis was reasonable in order to enable the Commission to assemble and thoroughly consider a more complete record. Third, because of the first two factors, it was reasonable for us to rely on uncontroverted evidence regarding interest rate trends and state authorized rates of return, rather than attempting to resolve complex and hotly contested cost of equity issues on less than a full record.[28] Finally, the interest rate trends and state authorized rates of return strongly suggested that the then authorized rate of return of 12% remained within the zone of reasonableness.

15. Consumer Coalition provides no valid reason for reconsidering our interim rate of return decision. Contrary to Consumer Coalition's position, we continue to believe that the abbreviated and interim nature of the proceeding is a relevant factor in reaching our decision.[29] Consumer Coalition's argument ignores the complexity of the issues raised by the parties as well as other important factors considered in our decision. Moreover, it ignores our finding that, had the 12% prescription fallen outside the "zone of reasonableness," we would have prescribed an interim rate that fell within that zone.[30]

16. Also, Consumer Coalition glosses over the disputed nature of the proceeding. Contrary to Consumer Coalition's position, there was considerable evidence offered to rebut its cost of equity arguments. Thus, we did not ignore any "unrebutted arguments." Rather, we acknowledged that the record was "mixed," and found that the disputed evidence could not be, in light of the time restrictions and the incomplete record, the basis for a change in the rate of return prescription.[31]

17. Finally, Consumer Coalition claims that the *Interim Prescription Order* is inconsistent with past Commission decisions that, according to Consumer Coalition, altered the rate of return based on changes in the cost of equity on a partial record.[32] While the Commission did increase the rate of return for an interim period in 1980, pending completion of an ongoing rate of return proceeding, Consumer Coalition's apparent comparison of that proceeding and the interim prescription proceeding is inapposite. In the *1980 Order*, the Commission stated that "testimony of the witnesses in the rate of return hearing [was] in general agreement that AT&T's cost of capital [had] risen."[33] By contrast, the record in this proceeding revealed no general agreement on whether the cost of capital had risen or fallen, but instead presented sharply conflicting positions. Moreover, based on the record before us at that time, we could not have satisfactorily resolved the disputes over cost of equity issues before the expiration of the prescribed rate of return on December 31, 1989.

18. Again, we conclude that Consumer Coalition provides no basis for reconsideration of our interim rate of return prescription or imposition of a refund order. Although Consumer Coalition requests that the LECs' rate of return "should be reduced immediately to 10.33% ... and refunds awarded from January 1, 1990 to the effective date of the LECs' rate reductions,"[34] we reject Consumer Coalition's request because we conclude that the 12% interim prescription was proper. We also find that Consumer Co-

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[25] *Id.* at 201, para. 38, *citing*, U.S. v. FCC, 707 F.2d 610, 618 (D.C. Cir. 1983) *and cases cited therein.*

[26] *Interim Prescription Order*, 5 FCC Rcd at 201, para. 37, *citing*, FPC v. Hope Natural Gas Co., 320 U.S. 591, 603 (1944). *See also* Bluefield Water Works v. PSC, 262 U.S. 679 (1923).

[27] The *Interim Prescription Order* began this represcription proceeding. *Interim Prescription Order*, 5 FCC Rcd at 202, para. 47.

[28] *Interim Prescription Order*, 5 FCC Rcd 202, para. 44. *See also 1975 Order*, 51 FCC 2d 619 (Commission reluctant to change rate of return based on possible changes in cost of equity, but altered it based on changes in embedded cost of debt or debt/equity ratio.).

[29] *See e.g.*, MCI v. FCC, 750 F.2d 135, 140, 141 (D.C. Cir. 1984)(upholding interim FCC action maintaining status quo pending outcome of rule making proceeding); MCI v. FCC, 712 F.2d 517, 531-536 (D.C. Cir. 1983)(upholding interim FCC action pending receipt of further information and resolution of fundamental issues in rule making proceeding).

[30] *Interim Prescription Order*, 5 FCC Rcd at 201-202, paras. 39-40.

[31] *Id.* at 202, paras. 41-42.

[32] Consumer Coalition Petition at 19, *citing*, American Telephone and Telegraph Company and the Bell System Operating Telephone Companies, Charges for Interstate Service, 78 FCC 2d 661, 668 (1980) (*1980 Order*).

[33] *1980 Order*, 78 FCC 2d at 668-669.

[34] Consumer Coalition Petition at ii.

alition provided no basis for imposition of an accounting order. Consumer Coalition's arguments do not undermine the reasonableness of our decision, and thus would not have supported imposition of an accounting order.

IV. OTHER MATTERS

19. We initiated Docket 87-463 to correct flaws in our Part 65 represcription process.[35] Recently, we undertook an overall reevaluation of that process.[36] The proposals in our new rule making supplant those in Docket 87-463. Moreover, Docket 87-463 was begun in 1987 when all LEC interstate access service and the interstate telecommunications services of the American Telephone and Telegraph Company were still under rate of return regulation. With our price caps initiatives, this is not the situation now. We therefore believe that comments submitted in that docket are stale and will not help us evaluate the proposals in our new rule making. Accordingly, we terminate Docket 87-463.

V. CONCLUSION

20. In addressing Consumer Coalition's specific arguments of our findings in the *Interim Prescription Order*, we find that our interim prescription's reasonableness was not undermined by Consumer Coalition's arguments for reconsideration.

VI. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, and 405, that the petition for reconsideration filed by Consumer Federation of America, International Communications Association, and MCI Telecommunications Corporation IS DENIED.

22. IT IS FURTHER ORDERED that CC Docket No. 87-463 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[35] Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket No. 87-463, *Notice of Proposed Rule Making*, 2 FCC Rcd 6491 (1987).

[36] Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, *Notice of Proposed Rulemaking and Order*, CC Docket No. 92-133, 7 FCC Rcd 4688 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: September 10, 1992

CERTIFIED MAIL NO. P 295 670 790
RETURN RECEIPT REQUESTED

James P. Riley, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036

Re: Notice of Forfeiture
issued to Mr. Jerry J. Collins,
Radio Station KPUP (AM),
Salinas, California on
October 23, 1991.
3153601-91086
SF-91-1665

Dear Mr. Riley:

This is in response to your Petition for Reconsideration dated November 13, 1991, that you submitted to the Federal Communications Commission (FCC). You requested reconsideration of a $950 monetary forfeiture penalty that had been assessed against Mr. Jerry J. Collins, licensee of Radio Station KPUP (AM) (now KHKN (AM)), 1188 Padre Drive, Salinas, California 93901, by the FCC's San Francisco, California Office. As explained below, we are affirming the $950 monetary forfeiture penalty.

Our records show that on March 27, 1991, FCC inspectors visited the antenna tower structures used by Radio Station KPUP. The FCC inspectors found that the gates on the fences surrounding each tower were closed, but not locked. On July 2, 1991, the FCC's San Francisco Office issued Mr. Jerry Collins, licensee of KPUP, a Notice of Apparent Liability for a willful violation of Section 73.49 of the FCC's rules, 47 C.F.R. Section 73.49. Section 73.49 requires antenna towers to "be enclosed within effective locked fences." Mr. Collins responded on August 2, 1991. On October 23, 1991, the FCC's San Francisco Office issued a Notice of Forfeiture for a $950 monetary forfeiture penalty. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934, 47 U.S.C. Section 503(b).

KPUP admits that the gates were unlocked, but states a number of reasons why it should not be subject to a monetary forfeiture penalty. First, KPUP explains that another FCC licensee on the towers was working on the towers the night before the FCC inspection and left the tower gates unlocked. Therefore, "the alleged violation . . . did not arise from an act by Mr. Collins or a negligent omission on the part of Mr. Collins." KPUP further argues that "the FCC's and the courts' rulings on forfeitures require that if a violation is not intentional it must be traceable to an act or omission of which the licensee is conscious." In support of this, KPUP cites *Vernon Broadcasting, Inc.*, 60 RR 2d 1275 (1986).

We disagree with KPUP's position as applied to the towers in question. In the related area of antenna marking and lighting, the FCC's rules state that "If a common tower is used by more than one licensee . . ., each licensee . . . shall be responsible for painting and lighting the structure . . . . [E]ach of the licensees . . . shall . . . be individually responsible for conforming to the requirements of the rules . . . ." 73 C.F.R. Section 73.1213(c). Similarly, the Commission in *Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978), refused to relieve the individual licensees on a tower of their FCC obligation to maintain the tower when they appointed a single person to maintain a tower. The Commission stated that "the Commission must from a regulatory standpoint look to each licensee for meeting rule requirements . . . " regarding the maintenance of towers. However, to reach a decision regarding KPUP's situation, it is not necessary at this time to determine whether the Commission's position concerning responsibility for tower maintenance also applies to its rule requiring a locked tower fence.

The Commission's decision in *Vernon Broadcasting* was distinguished in *High Country Communications, Inc.*, 2 FCC Rcd 7427, 7428 n. 10 (1987). In *High Country Communications*, the Commission stated "While the fence in *Vernon* was, by its very nature and location, subject to influences outside the immediate knowledge and control of the licensee, KVLE (FM)'s transmitter was, at all relevant times, under the exclusive domain of High Country. Any spurious emissions produced by the KVLE (FM) transmitter are attributable directly and solely to High Country." KPUP's situation has some similarities to *High Country Communications*. KPUP's towers are owned by Mr. Jerry Collins. The FCC inspectors that visited KPUP's towers stated that KPUP was the only licensee on at least one of the towers. Since the gate locks were unlocked as opposed to broken, it would appear that a person acting under the authority or approval of Mr. Collins unlocked the gates and failed to lock them as opposed to the vandalism that damaged the fence in the *Vernon Broadcasting* case. Mr. Collins in his August 2, 1991, letter to the FCC seems to acknowledge this. Licensees are held responsible by the FCC for the acts of their agents and similarly situated persons. *Liability of MTD*, 6 FCC Rcd 34 (1991). KPUP, therefore, had a high degree of control over the locking of the gates, and there is no indication that their unlocked condition resulted from "influences outside the immediate knowledge and control of the licensee." The fact that KPUP believes that it has taken steps to prevent a reoccurrence of the violation reflects that it could have taken these steps before the violation occurred.

Since all of the gates, moreover, were unlocked, this reflects a willful omission or laxity instead of a random accidental occurrence. Section 312(f)(1) of the Communications Act of 1934 defines willful as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule . . . of the Commission." 47 U.S.C. Section 312(f)(1). Willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question. Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting

wrongfully. In addition, the Commission has stated that "the policy factor which has been the main key to our actions in this area is a demonstrated lack of concern or indifference on the part of the licensee for compliance with the Act or our Rules . . . . The circumstances clearly indicate that the violations occurred because of the licensee's laxity. The violations could, and indeed should, have been easily avoided . . . . If a licensee shows a lack of concern for operating its station in a manner which will meet . . . [FCC] standards, resulting violations will be dealt with . . . " by the FCC. *Midwest Radio - Television, Inc.*, 45 FCC 1137, 1141-42 (1963).

Second, KPUP objects that the FCC's Notice of Forfeiture failed to specify when the monetary forfeiture payment should be paid as required by Section 1.80(f)(4) of the FCC's rules (47 C.F.R. Section 1.80(f)(4)), and states "How hypocritical it would be for FOB to insist on payment . . . while FOB is itself in violation of a clear rule of the Commission . . . ." KPUP is correct that it would have been appropriate for the Notice to state when the forfeiture should be paid, however, this is a moot point since KPUP requested reconsideration of the Notice. The FCC does not require payment while petitions for reconsideration of forfeitures are pending. It is also noted that the Notice of Apparent Liability provided 30 days for the payment of the forfeiture, and this is the same deadline customarily stated in Notices of Forfeiture.

Third, KPUP argues in its August 2 letter that the "violation was not . . . seemingly preventable," and KPUP then explains that it has taken steps to prevent another violation. If KPUP believes that it has taken effective steps to prevent a reoccurrence of the violation, it would appear that the original violation was preventable. Furthermore, remedial action, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC 2d 699, 700 (1966).

Finally, KPUP states that it routinely inspected the tower fences, the fences were checked the day before the FCC's inspection and the gates were locked, and the results of these inspections were entered in logs. The FCC inspectors discussed the violation with KPUP's employees when the gates were found unlocked and these employees did not offer to provide logs regarding KPUP's monitoring of the fences. Regardless of KPUP's monitoring of the fences, as previously stated, since all of the gates were unlocked this reflected a willful omission or laxity instead of a random accidental occurrence, and this violated the FCC's rule requiring a locked fence. There is no provison in this rule excusing a violation if a fence is regularly monitored. Although the monitoring of the fence may have been a factor in not imposing a forfeiture in the *Vernonbroadcasting* case, there were other factors in that case not present in KPUP's situation such as damage caused by forces beyond the control of the licensee, namely, vandalism.

Please request your client to submit the $950 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 3153601-91086 should be placed on the check and it should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CELLWAVE TELEPHONE SERVICES L.P. — File No. 10625-CL-P-370-A-89

For facilities in the Domestic Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 370, Florida 11 - Monroe

FUTUREWAVE GENERAL PARTNERS L.P. — File No. 10810-CL-P-615-A-89

For facilities in the Domestic Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 615, Pennsylvania 4 - Bradford

GREAT WESTERN CELLULAR PARTNERS — File No. 10269-CL-P-492-A-88

For facilities in the Domestic Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 492, Minnesota 11 - Goodhue

MEMORANDUM OPINION AND ORDER

Adopted: August 25, 1992; Released: September 11, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it the above-captioned cellular applications for rural service areas (RSAs) which were dismissed as defective by the Mobile Services Division (MSD) of the Common Carrier Bureau.[1] The three seek reconsideration of their dismissals.[2] The petitions have been referred to the Commission pursuant to Section 1.106(a)(1) of the rules in order to expedite the resolution of the matters raised. The three applications were dismissed pursuant to Section 310(b)(3) of the Communications Act of 1934, as amended, (the Act) and Section 22.4 of the Commission's rules because they include owners who are non-limited alien partners.[3] For the reasons discussed below, we affirm the dismissal of the applications.

II. BACKGROUND

2. The applications of Cellwave Telephone Services, L.P. (Cellwave), and FutureWave General Partners L.P. (FutureWave) stated that they were limited partnerships under Delaware law. Great Western Cellular Partners (GWCP), organized under New Mexico law, on the other hand, remained a general partnership but attempted to insulate an alien partner by having that alien partner attempt to form a limited partnership with another general partner who was a U.S. citizen. The limited partnership formed by these individuals was to vote both of their interests as a single general partner of GWCP. The only limited partners in each of these applications were aliens. The MSD returned the applications of Cellwave, FutureWave and GWCP as defective, citing violations of Section 310 of the Act. The parties argue that they had formed limited partnerships prior to filing their applications and therefore the aliens were sufficiently insulated in compliance with Section 310(b)(3) of the Act.[4]

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[1] *See* Letter from Chief, Mobile Services Division to Dr. Robert Edward Jardinico, dated March 19, 1990 (dismissing Cellwave Telephone Services, L.P. for alien ownership in violation of Section 310 of the Act); Letter from Chief, Mobile Services Division to William F. Schwaibold, dated January 9, 1991 (dismissing FutureWave General Partners L.P. for alien ownership interest in violation of Section 310 of the Act); and Letter from Chief, Mobile Services Division to Mr. Stan Bramwell, dated February 25, 1991 (dismissing Great Western Cellular Partners for alien ownership in violation of Section 310 of the Act).

[2] Thomas Domencich and the Committee for a Fair Lottery (CFL) have opposed the petitions for reconsideration. All three applicants have filed replies. Optima Cellular Partnership filed an opposition to GWCP's petition. Additionally, on April 17, 1992, Cellwave and FutureWave each filed an untimely and unauthorized Supplements to Petitions for Reconsideration. Because of the nature of the arguments involved, we have considered the issues raised in the supplements.

[3] A non-limited partner refers to partners in a partnership without limited partners and to general partners within a limited partnership. The Commission utilizes standards set forth in *Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 97 FCC 2d 997 (1984), *reconsidered in part*, 58 Rad. Reg. (P & F) 2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986), to determine whether an alien is sufficiently insulated from the control and management of the partnership to be deemed a limited partner. *See Continental Cellular*, 6 FCC Rcd 6834 (1991).

[4] Cellwave filed its application for a cellular authorization on November 4, 1988. Cellwave filed a certificate of limited partnership with the state of Delaware on September 8, 1989. FutureWave filed its application on December 9, 1988 and its certificate of limited partnership with Delaware on November 13, 1989. GWCP filed its application for a cellular authorization on September 16, 1988. The two partners of GWCP which attempted to form a limited partnership, filed with the office of the Santa Fe County Clerk in Santa Fe, New Mexico, on July 31, 1989.

III. DISCUSSION

3. Section 310(b)(3) of the Act and Section 22.4 of our rules prohibit grant of a license to aliens or alien controlled enterprises. *See Continental Cellular, supra.* This prohibition has been interpreted to include partnerships with non-limited alien partners. *See Wilner & Scheiner,* 103 FCC 2d 511 (1985), *reconsidered in part,* 1 FCC Rcd 12 (1986), *recon. granted in part,* 1 FCC Rcd 12 (1986). The MSD dismissed the applications of Cellwave, FutureWave and GWCP because each had failed to perfect limited partnerships under applicable state laws, thereby failing to insulate their alien partners pursuant to our requirements.

4. Unlike a general partnership, a limited partnership cannot be created by a contract alone, nor may the status of its members be established by implication because its formation is governed by statutory requirements. *See* 59A Am. Jur. Partnership Section 1249 et. seq.; *see generally* Reuschlein and Gregory, *Agency and Partnership.*[5] The state laws of Delaware and New Mexico require parties seeking to create limited partnerships to file for certification with the state or county of registration.[6] However, none of the subject applicants complied with this requirement prior to the date it filed its application (*see supra,* note 4).

5. *Cellwave and FutureWave.* Cellwave argues that a sufficient number of its partners voted to amend its general partnership agreement prior to the date it filed its application. FutureWave, on the other hand, concedes that it failed to amend its partnership agreement prior to the filing of its application, but argues that its application was nonetheless acceptable for filing as its partners had later agreed to become a limited partnership. Both Cellwave and FutureWave argue in their Supplements that courts in other states have found limited partnerships to exist prior to the filing of the certificate notwithstanding the requirement to file such a certificate.

6. While no Delaware court has applied Delaware law to the issue of not timely filing a certificate of limited partnership,[7] the Delaware Supreme Court has addressed an analogous issue in a case which required it to apply Florida law. In *Harry David Zutz Insurance, Inc. v. H. M. S. Associates, Limited,* 360 A.2d 160 (Del. 1976), the Delaware Supreme Court, upon finding no Florida case law on the effect of failing to comply with the statutory filing requirements for amending limited partnerships,[8] found that

> [t]he courts of other jurisdictions, however, have generally required strict compliance with all statutory formalities before a limited partnership agreement is given effect. Thus, they have held that where a partnership agreement is entered under which some parties are named as limited partners, such named partners are not entitled to the protection of limited partnership status, until the formal recording requirements have been met.

360 A.2d at 162 (citations omitted). Additionally, the court noted that the Delaware Court of Chancery in *Widder v. Leeds,* 217 A.2d 32 (Del. 1974), also supported strict application of the recording requirements for limited partnerships. *Id.* at 162. The court concluded that "recording is a prerequisite to the assertion of the [limited partnership] status." *Id.* at 163. Accordingly, we find that the Delaware courts have held that the statutory requirements associated with limited partnerships are to be strictly observed.

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[5] The state laws governing limited partnerships are derived from the Uniform Limited Partnership Act of 1916 which was updated by the Uniform Limited Partnership Act of 1976 (ULPA) and revised by the Revised Uniform Limited Partnership Act of 1985 (RULPA). The comments of the drafters of the RULPA stated the requirement to file a certificate of limited partnership with the state was retained "to make it clear that the existence of the limited partnership depends only upon compliance with this section." Rev. Unif. Ltd. Part. Act Section 201(b), 6 U.L.A. 293 (1991).

[6] Section 17-201 of Title 6 of the Delaware Code states in pertinent part:

> (a) In order to form a limited partnership, 1 or more persons (but not less than all the general partners) must execute a certificate of limited partnership. The certificate of limited partnership shall be filed in the Office of the Secretary of State . . . .
>
> (b) A limited partnership is formed at the time of the filing of the initial certificate of limited partnership in the Office of the Secretary of State or at any later date or time specified in the certificate of limited partnership....

Section 54-2-9 of the New Mexico Code states in pertinent part:

> A. In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the secretary of state. . . .
>
> B. A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the secretary of state or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section. Limited partnerships organized under the laws of the state of New Mexico which do not participate in a public offering or general solicitation and have fewer than ten limited partners, shall not file certificates of limited partnership with the secretary of state but shall file for record certificates of limited partnership, . . . in the office of the county clerk wherein is located in the principal place of business.

[7] We, therefore, attempted to obtain an opinion from the Attorney General of Delaware. *See* Letter from Chief, Legal Branch, MSD, to the Honorable Charles M. Oberly, III, dated December 31, 1991. On March 26, 1992, the Delaware Attorney General responded that his office represents the State of Delaware and its agents and it is their policy not to provide legal opinions on matters which do not directly involve the state or its agents. *See* Letter from the Honorable Charles M. Oberly, III to James Talens, dated March 26, 1992.

[8] In Harry David Zutz, a partner attempted to terminate his interest in the partnership. Florida law required an amendment be filed to the partnership's certificate of limited partnership before the termination became effective. The amendment was not timely filed.

7. FutureWave argues that pursuant to another provision of Delaware law,[9] its alien partner can be considered a limited partner even though the certificate of limited partnership was filed with the state after its cellular application was filed with the Commission. Again, no Delaware court has interpreted this section. Section 17-304 of Title 6 does, however, directly mirrors Section 11 of the ULPA and Section 304 of the RULPA and courts have rendered opinions as to these sections. These courts have interpreted Section 11 and 304 only to protect a person believing he is a limited partner from the same liability of a general partner in civil actions. These sections have not been applied so as to allow a limited partnership to be created without compliance with the filing requirements. A federal court recognized this limited purpose of Section 11 when it stated in *In re Marcuse*, 281 F. 928 (7th Cir. 1922), *aff'd sub nom. Giles v. Vette*, 263 U.S. 553 (1924), that

> [Section 11 of the ULPA] is not designed to amend or correct or perfect the limited partnership organization, so that it may thereafter continue as such, but looks rather to the termination of the relation, and relief from general liability on compliance with the terms of the section in all those cases where persons erroneously believed they had become limited partners, without regard to whether or not the belief was induced by supposed compliance with this or any other act.

281 F. at 936.[10] We conclude from the record, a plain reading of Delaware law and the cases cited that strict adherance to the Delaware limited partnership filing requirements is necessary in order to form such an enterprise under its laws. Accordingly, Cellwave and FutureWave were not legal limited partnerships when they filed their cellular applications and accordingly, participation by the alien partners violated Section 310(b)(3) of the Communications Act. Therefore, the MSD's action is affirmed.

8. *GWCP*. The real party in interest exhibit to GWCP's application lists Mary Scott Taylor as a partner with a 2.5 percent interest in the applicant. The exhibit further lists Jay F. Pritchett as a 2.5 percent partner. In an amendment filed after GWCP was selected as the tentative selectee, GWCP informed the Commission that Taylor is an alien and that she and Pritchett had purportedly formed P&T Limited Partnership (P&T) between themselves prior to filing of the application. The amendment further stated that P&T was a five percent general partner in GWCP. The original exhibit to the application does not, however, list P&T, which was purportedly formed to insulate alien Taylor, as a partner. Accordingly, on the face of the application as filed, there is no indication that Taylor is anything other than a general partner. GWCP argues that Taylor and Pritchett entered into their agreement prior to filing, despite the fact that the filing does not reflect such an agreement and the fact that they only executed the limited partnership with the county clerk's office after filing their application with the Commission. Moreover, GWCP cannot correct the defect of having an alien as a general partner in its original application with a post-filing amendment. *See Continental Cellular, supra; Rem Communications*, 3 FCC Rcd 3705 (1988).

9. Furthermore, because P&T failed to file its certificate of limited partnership with the county clerk's office prior to filing its application with the Commission, we cannot find that the alien Taylor was insulated pursuant to the requirements of Section 310(b)(3) of the Act and Section 22.4 of our rules.[11] GWCP argues that the New Mexico Supreme Court in *Hoefer v. Hall*, 411 P.2d 230 (N.M. 1965) *reh. denied*, allowed a limited partnership to be formed without the filing of the certificate. GWCP argues the court's decision demonstrates that the failure to file the certificate does not adversely affect the formation of the limited partnership.

10. GWCP misconstrues the court's decision in *Hoefer*. The New Mexico Supreme Court did not make a broad decision as claimed by GWCP. The court instead, carefully limited its decision to the facts present in *Hoefer*. The court said that "[u]nder the circumstances of this case, where neither the rights of third parties nor a partner's claim of limited liability is involved, we cannot see how the failure to record the certificate could affect the existence of a limited partnership insofar as the parties, inter se, are concerned." *Id.* at 233. The circumstances in this

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[9] Section 17-304 of Title 6 of the Delaware Code provides in pertinent part:

> [A] person who makes a contribution to a partnership and erroneously but in good faith believes that he had become a limited partner in the limited partnership is not a general partner in the partnership and is not bound by its obligation by reason of making the contribution, receiving distributions from the partnership or exercising any rights of a limited partner, if, within a reasonable time after ascertaining the mistake . . . he causes an appropriate certificate to be executed and filed . . . .

[10] The notes to Sections 11 and 304 lend further support that Section 11 of the ULPA is only to protect partners from general liability and not to prove the actual formation of a limited partnership prior to the filing of the certificate. The notes to Section 11 of the 1916 Act read that "[t]his section applies to relieve from liability persons named as special partners who did not participate in the management though it was attempted to form a limited partnership . . . " Unif. Ltd. Part. Act Section 11, 6 U.L.A. 595 (1969). The notes to Section 304 of the 1985 RULPA go further to state that "the only situation to which Section 304 would now appear applicable is one in which a person intending to be a limited partner was erroneously identified as a general partner in the certificate." Rev. Unif. Ltd. Part. Act, 6 U.L.A. 336 (1991).

An explanatory note which accompanied the 1916 Act at the time of its recommendation to the states by the National Conference of Commissioners on Uniform State Laws stated with regard to Section 11 that "failure to comply with the requirements of the act in respect to the certificate, while it may *result in the nonformation of the association*, does not make him a partner or liable as such." *National Conference on Uniform State Laws Proceedings, Twenty-sixth Annual Meeting*, 386-87 (1916).

[11] The Commission also attempted to obtain an advisory opinion from the Attorney General of New Mexico as to the affect of failing to filed the certificate of limited partnership. *See* Letter from Chief, Legal Branch, MSD, to the Honorable Thomas Udall, dated February 3, 1992. The New Mexico Attorney General also declined to comment on the applicability of New Mexico law.

case are distinctly different.[12] The court in *Hoefer* relied on the fact that the only parties involved were the partners in the limited partnership. The interests in the instant case involve more than the parties to the agreement. Here, there are significant public interest concerns of alien control of domestic communications facilities. The court in *Hoefer* recognized that a limited partner cannot assert limited liability if the certificate is not filed in stating that "in order to obtain the privilege of limited liability, one must conform to the statutory requirements." *Id.* at 232 (citations omitted). Therefore, we conclude that the court's decision in *Hoefer* is distinguishable from the facts present here and does not demonstrate that New Mexico courts are willing to allow the formation of a limited partnership without first complying with the statutory requirements.

11. Cellwave, FutureWave and GWCP also proffer other arguments that their applications should be reinstated. Specifically, they argue that alien partners are not included in the prohibitions of Section 310(b)(3) of the Act and Section 22.4 of the rules, that those sections only prohibit the grant of an application with an alien and not the filing of such an application, that they may amend their applications to correct the defect, that the Commission previously allowed an applicant to correct an alien defect in *GTRW Partnership*, 2 FCC Rcd 4160 (Mob. Serv. Div. 1987), and that the MSD's action denies them equal protection under the law. We have previously rejected such arguments. *See Continental Cellular, supra.* We have held that alien partners are included in the alien ownership prohibitions and that alien ownership is a filing defect which cannot be corrected by amendment. Furthermore, we overruled the portions of the MSD's decision in *GTRW* which were inconsistent with our decision in *Continental Cellular.* We further held that the prohibitions against alien control do not violate the equal protection rights of the applicants. Accordingly, Cellwave's and FutureWave's other arguments concerning the acceptability of their applications is rejected.

IV. CONCLUSION

12. We find that the laws of Delaware and New Mexico require compliance with the certification requirements prior to the formation of a limited partnership. Neither Cellwave nor FutureWave filed their certificates of limited partnership with the state prior to filing their cellular applications. Likewise, P&T did not file its certificate with the county clerk in Santa Fe before GWCP filed its application with the Commission. Without a lawful limited partnership being created prior to filing applications with the Commission, we cannot under the guidelines of *Wilner & Scheiner, supra,* find that the alien partners had insulated their control within the meaning of Section 310(b)(3) of the Act. Therefore, we find that the MSD was correct to return those applications.

V. ORDERING PARAGRAPH

13. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by Cellwave Telephone Services, L.P. (File No. 10625-CL-P-370-A-89), FutureWave General Partners L.P. (File No. 10810-CL-P-615-A-89) and Great Western Cellular Partners (File No. 10269-CL-P-492-A-88) are HEREBY DENIED and the dismissals of the applications by the Mobile Services Division ARE AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[12] In *Hoefer*, the plantiff brought an action to recover on a promissory note for $5,000 executed by the defendant. The defendant argued that as a part of the same transaction of execution of the note, he and the plantiff entered into a limited partnership agreement where the plantiff agreed to pay the defendant $5,000 for a 5% interest in the limited partnership when it had been in business for six months. A certificate of limited partnership was executed but never filed. The court held "that a limited partnership *as between the parties* came into existence upon the execution by them of the certificate of limited partnership." 411 P.2d at 233 (Emphasis added).
The only interests involved in the *Hoefer* case involved the two partners of the purported limited partnership.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Niles Broadcasting Company For Renewal of License for Stations WNIL/WAOR-FM Niles, Michigan

File Nos. BR - 890504UA
BRH - 890504UB

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1992; Released: September 10, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for two radio stations in Michigan; (ii) a Petition to Deny timely filed on September 1, 1989, by the Michigan State Conference of Branches of the NAACP, respective branches of the NAACP operating within the service areas of the referenced stations and the National Black Media Coalition (hereinafter "NAACP/NBMC") against the renewal applications of these broadcast stations;[1] (iii) an opposition from the licensee; and (iv) the licensee's response to a staff letter of inquiry. NAACP/NBMC allege that the stations violated the Commission's equal employment opportunity (EEO) Rule and policies. NAACP/NBMC request that the Commission designate the renewal applications for hearing. Conversely, the licensee claims that NAACP/NBMC fail to raise any substantial and material questions of fact and request immediate and unconditional renewal.

II. BACKGROUND

2. *STANDING.* The licensee has challenged NAACP/NBMC's standing to petition the instant renewal applications. It argues that the statements submitted with the Petition to Deny fail to meet the requirements of Section 309(d)(1) because the persons fail to state that they are either residents of the Niles area or listeners to either of the petitioned stations. Because NAACP/NBMC fail to demonstrate party in interest status, the licensee requests dismissal of the petition.

3. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989) (*Dubuque*). The allegations, except those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

4. Submitted with the petition to deny was a declaration under penalty of perjury from the President of the Michigan State Conference of Branches of the NAACP. While timely submitted, the statement did not indicate that he is either a listener of the challenged stations or a local resident of the stations' service areas. Moreover, the petition did not include declarations from any other officials or members of the local branches of the NAACP sufficient to establish standing.[2] Thus, the statement submitted by NAACP does not satisfy the requirements of the Act. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Company*, 55 Rad. Reg. 2d (P&F) 1311, 1311-12 (1984). Accordingly, we hold that the NAACP lacks standing to petition the stations in question and we will treat its pleading as an informal objection in accordance with 47 C.F.R. 73.3584(b).

5. The petition also contained a statement under penalty of perjury from the chairman of the NBMC, a resident of the Washington, D.C. area. However, the Commission has held previously that the statement of a person who does not claim to be a listener of the challenged station nor a resident of its service area does not satisfy the standing requirements of the Act. *See Michigan/Ohio, supra*, and *KDEN, supra*. Accordingly, we hold that NBMC lacks standing to petition the referenced Michigan stations. Thus, we likewise will treat its pleading as an informal objection. 47 C.F.R. 73.3584(b).

III. PLEADINGS

6. NAACP/NBMC derived their factual allegations from the licensee's EEO program and annual employment reports. Review of the allegations and available information on the licensee's EEO program led us to conclude that NAACP/NBMC had presented a *prima facie* case against the two stations demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. Section 309(d)(1). *Astroline, supra*.[3] Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

7. Our subsequent evaluation of the stations' EEO efforts, based on a review of NAACP/NBMC's allegations, the licensee's renewal applications, opposition, and inquiry response, leads us now to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that the licensee engaged in discrimination. Thus, grant of the applications will serve the public interest. 47 U.S.C. Section 309(d)(2); *Astroline, supra*. Accordingly, we will grant renewal but with appropriate sanctions and remedies as analyzed and discussed herein.

IV. DISCUSSION

8. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to

recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in applicant pools. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080(b) and 73.2080(c).

9. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO), petition for recon. pending; see also* 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). *See e.g., Beaumont, supra; Bilingual, supra.*

10. Review of the licensee's renewal applications, opposition and inquiry response indicates ten full-time, including seven upper-level, hiring opportunities during the three-year period April 1, 1986, to April 1, 1989.[4] During that period, the licensee reported receiving minority referrals from two newspapers, *South Bend Tribune* and *Niles Daily Star* (two referrals), and from Specs Howard School of Broadcasting (two referrals). In addition to receiving unsolicited applications, the licensee contacted but received no minority referrals from: employees' referrals, industry contacts, Indiana University, Central Michigan University, Lake Michigan College, Southwestern Michigan College, Michigan State University, Michigan Employment Security Council, *Radio & Records*, on-air announcements, *Herald - Palladium* and NAACP. It appears that the licensee did not establish a consistent recruitment pattern. Some of the listed organizations were contacted prior to filling four positions but none were used for the other six. The latter were filled by the hire of "freelancers" (two jobs), employees' referrals (two jobs) and unsolicited applicants (two jobs). The licensee reported five minority applicants for three of the ten positions. A minority, who had been a freelance reporter, was hired full-time in July 1987. This employee apparently left the stations prior to the reporting period for the 1988 annual employment report.

11. Noting the absence of minority employment during most of the license term and the failure to hire any minorities for the positions filled during the reporting year (April 1, 1988 to April 1, 1989), NAACP/NBMC assert that the EEO program is ineffective and fault the licensee for proposing only one minority recruitment source. Conversely, the licensee states that NAACP/NBMC's allegations are based solely on a cursory review of the stations' annual employment reports and renewal EEO program. The licensee claims that it contacted sources such as newspapers with significant minority circulation and academic institutions that are "recognized source(s) of minority applicants" during the license term and received minority referrals. Moreover, the licensee maintains that two minorities were hired for part-time upper-four positions in September 1989. The licensee also indicated that in the last few months of the license term it added a statement to its newspaper advertisements encouraging women and minority applications.

12. Based on the foregoing, we find no substantial and material question of fact warranting a hearing. The licensee's record does not reveal evidence of discrimination in that five minority applicants were attracted between 1986 and 1989 and a minority was hired as a full-time news reporter in 1987.

13. However, the record does reveal inadequate EEO efforts. Specifically, the licensee failed to establish a continuing EEO recruitment program and review its efforts, as was the case in WTGL-TV, Cocoa, Florida. *See Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988). The licensee of WTGL-TV[5] reported nine hires during the period under review. Like the licensee of WNIL/WAOR-FM, WTGL-TV's recruitment list included both general and minority referral organizations. However, WTGL-TV's EEO efforts were inadequate because it failed to address the absence of minorities from its full-time staff for most of the license term. In this regard, the licensee neglected to self-assess and modify its program until after filing its renewal application.

14. The licensee in the instant case had similar EEO program deficiencies because it failed to attract and retain minorities on its full-time staff. Despite attracting only five minority applicants from 1986 to 1989 and showing no minority employees on its EEO employment reports throughout the license term (the minority hired in 1987 was not employed long enough to be reported in 1988), the licensee did not assess its EEO efforts until the last few months of the license term. Notwithstanding the absence of minority employees, the licensee used recruitment sources for only four of its ten vacancies. Thus, even though grant of the application would serve the public interest, we will impose reporting conditions for three years in order to assure ourselves that the licensee's recruitment and self-assessment comports fully with Commission rule 73.2080(b)(3), (b)(5), (c)(2) and (c)(5).

V. CONCLUSION

15. Upon review of the record and the submissions of the parties, we find grant of the renewal applications justified. However, we will impose reporting conditions on the licensee of WNIL/WAOR-FM and monitor its future performance.

VI. ORDERING CLAUSES

16. Accordingly, IT IS *ORDERED* that the informal objections filed by the Michigan State Conference of Branches of the NAACP and its affiliate branches and the *NBMC ARE DENIED.*

17. *IT IS FURTHER ORDERED* that the license renewal applications for WNIL/WAOR-FM *ARE GRANTED* subject to the reporting conditions specified herein.

18. *IT IS FURTHER ORDERED* that the licensee of the above stations submit to the Commission an original and one copy of the following information on June 1, 1993, June 1, 1994, and June 1, 1995:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[6]

(b) A list of employees as of the May 1, 1993, payroll period for the first report and as of the May 1, 1994, and May 1, 1995, payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

19. *IT IS FURTHER ORDERED*, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

20. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

21. Should you have any questions regarding this action or require further information concerning employment reports, you may call the Mass Media Bureau's EEO Branch at (202) 632-7069.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] The Petition to Deny also included challenges against other radio stations in Michigan. They will be addressed in separate Commission orders.

[2] On October 3, 1989, we received the late-filed statement of the President of the Niles Branch of the NAACP regarding WNIL/WAOR-FM. However, NAACP/NBMC did not explain why it had not been timely filed with the Petition to Deny pursuant to Commission rule 73.3584, 47 C.F.R. 73.3584. As previously held, we will not acquiesce to late filings without substantial justification. Thus, the subject late-filed statement will not be accepted. *See Application of Certain Broadcast Radio Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988).

[3] The licensee was not challenged regarding its efforts directed toward women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward women and found them sufficient.

[4] WNIL/WAOR-FM, located in Niles, is part of the Benton Harbor Metropolitan Statistical Area (MSA) which has a labor force comprised of 42.1% females and 12% minorities (10% Blacks, 1.0% Hispanic, .7% Asian/Pacific Islander and .3% American Indian). The licensee's Annual Employment Reports from 1983 through 1989 show no minority employees on a staff that varied in size from 14 to 19 employees, including between 12 and 16 upper-level employees.

[5] WTGL-TV was located in the Melbourne-Titusville-Palm Bay MSA which included a labor force of 10.1% minorities (7.4% Blacks). It had a full-time overall staff of 14 employees.

[6] Such a list might start:

1) News Director:	Officials and Managers;	Full-time.
3 Applicants:	1 White female	A.W.R.T.
	1 Hispanic male	National Hispanic Media Coalition
	1 Black female	NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition, and NAACP.

Selected - Hispanic male (08/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

Contel Cellular, Inc. File No. MSD-91-9

For a Tax Certificate in the
Domestic Public Cellular
Telecommunications Radio Service for
Divestiture of its Minority Interest
in Frequency Block B, in Market No. 88,
Chattanooga, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1992; Released: September 11, 1992

By the Commission:

I. INTRODUCTION

1. On May 20, 1991, Contel Cellular, Inc. (Contel) filed an Application for Review of the denial by the Mobile Services Division (MSD), Common Carrier Bureau, of Contel's request for a tax certificate. *See Request of Contel Cellular, Inc.*, 6 FCC Rcd 2080 (Mob. Serv. Div. 1991). Contel also filed a Supplement To Application for Review. For the reasons stated below, we affirm the denial of Contel's tax certificate request.

II. BACKGROUND

2. Contel had filed an application for an assignment of license from McCaw Cellular Communications, Inc. for thirteen cellular systems, including the non-wireline system in the Chattanooga, Tennessee Metropolitan Statistical Area (MSA).[1] The Commission approved the transfer on the condition that Contel divest its existing minority ownership interest (7.385%) in the Chattanooga MSA wireline licensee.[2] Subsequently, Contel sold this interest for cash.

3. On February 7, 1991, Contel filed a tax certificate request. Pursuant to Section 1071(a) of the Internal Revenue Code, if the Commission certifies the sale or exchange of property to be (i) necessary or appropriate to effectuate a change in a policy, or the adoption of a new policy; and (ii) the relevant policy relates to the ownership and control of "radio broadcasting stations," the transaction shall be treated at the election of a taxpayer as an involuntary conversion of property in accordance with Section 1033 of the Code.[3] Section 1033 permits a taxpayer to elect to defer rather than recognize taxable gain on the involuntary conversion of the asset.[4] The sale or exchange of property does not have to be compelled by a Commission divestiture order; the divestiture may be voluntary and eligible for a certificate where the retention of an ownership interest would be inconsistent with a new or changed Commission policy.[5] For cellular markets 31-90, including the Chattanooga MSA, the Commission determined that under Section 1071(a) it was within its authority and in the public interest to issue tax certificates in regard to the sales and exchanges of partnership interests of non-wireline entities in order to provide equitable tax treatment. *Telocator Network of America (Nonwireline Cellular Transfers)*, 58 Rad. Reg. 2d (P&F) 1443, 1445 & n.22 (1985); *reconsideration dismissed*, 1 FCC Rcd 509 (1986).[6]

4. The MSD denied Contel's request on the ground that the divestiture of its minority wireline interest did not meet the first criterion of Section 1071(a), because the Commission had a longstanding policy to ensure competition between the separate frequency blocks for non-wireline and wireline systems in a cellular market. *See Request of Contel Cellular, Inc.*, 6 FCC Rcd at 2080. A primary concern of that policy, stated the MSD, was close scrutiny of the anti-competitive effects of proposed transfers of control regardless of whether the ownership interests involved were majority interests. *Id.* Further, the MSD observed that *Nonwireline Cellular Transfers* provided for tax certificates to be issued solely for the non-wirelines. Unlike the wirelines, the MSD stated, non-wirelines had not been able to complete exchanges of ownership interests prior to a change to the tax code eliminating non-recognition of gain from partnership exchanges.[7] *Id.* at 2080-81. The MSD also noted that the Commission conditioned the issuance of certificates on the completion of the non-wireline transfers prior to the end of the construction period for initial cellular systems in markets 31-90. The MSD found that these conditions for this earlier issuance of tax certificates were not applicable to Contel's transaction. *Id.*

III. DISCUSSION

5. Contel argues that the availability of tax certificates should not be limited to the circumstances of *Nonwireline Cellular Transfers* -- i.e., available only to non-wireline carriers during the pre-construction period. Contel first contends that the Congressional intent in Section 1071 was to facilitate the Commission's longstanding pro-competitive policy to eliminate common ownership of directly competing radio facilities, *id.* at 1148, and that we should issue it a certificate consistent with that intent because its divestiture reflects the Commission policy. This argument is without merit. In specifically holding in *Nonwireline Cellular Transfers* that the second criterion of Section 1071, "relating to . . . radio broadcasting stations," did not bar tax certificates for transfers of non-wireline partnership interests, the Commission found that an expansive statutory construction of the phrase was supported by other factors in addition to the legislative intent underlying Section 1071. *Id.* at 1448-50. These considerations included dramatic changes in the telecommunications marketplace and Commission precedent for issuing certificates in areas that do not directly bear upon broadcasting. *Id.*

6. Moreover, the Commission determined that there were significant policy considerations in fostering competition in the new cellular marketplace that constituted a compelling equitable basis for limiting the issuance of tax certificates to non-wireline cellular entities. *Id.* at 1450-51, & nn. 22-23; *reconsideration dismissed*, 1 FCC Rcd at 510 n.11. The considerations entailed (i) the need for regulatory tax parity for non-wirelines so that they could compete with wirelines in the initial licensing stage, and (ii) the availability of capital without a tax burden for the construction of their systems. *Id.* at 1449-50. These considerations simply do not apply to Contel's divestiture of a partial interest in one wireline cellular system.

7. Contel next contends that affording tax relief to non-wirelines and denying it to a wireline in a situation similar to the settlement of partnership interests (*see Nonwireline Cellular Transfers)* does not result in the "competitive parity" sought by the Commission. *Id.* This contention was throughly considered and rejected by the MSD. *Request of Contel Cellular, Inc.*, 6 FCC Rcd at 2080-81. The wireline carriers, unlike the non-wireline carriers, were able to consummate their settlements before the amendment to the tax code that eliminated the non-recognition of gain for the sale or exchange of partnership interests. *See supra*, note 7. We therefore determined that regulatory tax parity was necessary.[8] *See Nonwireline Cellular Transfers*, 58 Rad. Reg. 2d (P&F) at 1450-51 & nn. 21 & 23.

8. Contel also asserts that the issuance of tax certificates should not be limited to the pre-construction period in the initial licensing phase, because Congress envisioned in Section 1071 the divestiture of an existing station rather than an unconstructed one. *Id.* at 1451. The Commission recognized that potential tax liability to the non-wirelines in MSAs 31-90 could threaten the ability to attract capital for construction, and found that it was reasonable to establish the construction period as the cut-off for qualifying for a tax certificate. *Id.* at 1450 & n.20. Contel has not presented a convincing reason to warrant modifying the tax certificate policy enunciated in *Nonwireline Cellular Transfers*. Its assertion is therefore rejected.

9. If we were to extend the tax certificate policy to wireline carriers, Contel contends that it would be eligible under Section 1071(a) of the Internal Revenue Code. Contel contends that the MSD erred in concluding that the divestiture of its wireline minority ownership interest was not pursuant to a new policy, as required by Section 1071(a). Contel argues that prior to the Commission imposing the condition to divest, there was no Commission policy prohibiting a minority ownership interest in one frequency block while holding the controlling interest in the other. Contel asserts that although there were general statements regarding the promotion of competition between the two frequency blocks and a Commission prohibition against holding controlling ownership in both simultaneously, the issue of whether minority cross ownership interests were prohibited had not been addressed. *See Communications Industries, Inc.*, Mimeo No. 0770 (Com. Car. Bur. 1985). Contel therefore asserts that it could not have known prior to the proposed transfer that it would have to divest its minority interest. Thus, Contel concludes, the divestiture of its minority wireline interest in connection with the non-wireline transfer in Chattanooga was pursuant to a new policy and qualifies for a tax certificate.

10. We cannot agree that the condition to divest Contel's minority wireline interest was imposed because of any new policy within the meaning of Section 1071(a). One of the Commission's chief objectives in establishing two frequency blocks per market for cellular service was the promotion of competition. *Cellular Communications Systems (Cellular Systems)*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58, 69-77 (1982) (subsequent history omitted). In granting an application for transfer of control, the Commission gives serious consideration to the anti-competitive aspects of the proposal in determining whether it satisfies the public interest requirement under Section 309(a) of the Communications Act of 1934, as amended. *United States v. FCC (SBS)*, 652 F.2d 72, 88 (1980). *See generally NARUC v. FCC*, 525 F.2d 630, 636 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). The Commission has always had a responsibility to evaluate consequences of mergers under the anti-trust laws. *Id.* Transfers proposing ownership interests that "cross the fence" between cellular wireline and non-wireline frequency blocks invoke such an anti-trust evaluation, especially if they involve controlling interests. *See James T. Rill*, 60 Rad. Reg. 2d (P&F) 583, 596 (1986); *Communications Industries, Inc.*, Mimeo No. 0770 (Com. Car. Bur. 1985). In short, the policy pursuant to which the Commission examined Contel's wireline interest was not new. Indeed, Contel's application for assignment shows *prima facie* awareness that the Commission would scrutinize the proposed transfer for anti-competitive effects, because Contel stated in its assignment application that it would divest its wireline minority interest prior to consummating the transfer. *See* Contel Assignment Application, Exhibit 4.[9]

11. Contel adds that the recent adoption of a specific rule to prohibit the holding of any interest in one frequency block while holding the controlling interest in the other confirms the absence of a policy prior to imposing the condition on Contel.[10] This argument ignores the existing policy that was the basis for the rule.[11] The existing policy, *viz.*, close oversight of the effects of a proposed assignment to ensure competition within a market, had been applied for some years on a case-by-case basis under our authority to approve transfers involving controlling ownership interests and the consequent anti-competitive concerns.[12] The imposition of the condition to divest on Contel simply constituted application of that policy to its circumstances, not a departure from earlier policy. Therefore, we affirm the MSD's conclusion that divestiture furthered an established policy.

IV. CONCLUSION

12. In summary, we affirm the MSD's determination that the condition of divestiture of Contel's minority wireline interest on its Chattanooga MSA transaction was in furtherance of an existing Commission policy. The divestiture was not necessary or appropriate to effectuate a new policy. We also conclude that the considerations in *Nonwireline Cellular Transfers* for equitable treatment for non-wirelines do not apply to Contel and that it has not presented compelling reasons for us to modify our tax certificate policy.

V. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED that the Application for Review filed by Contel Cellular, Inc. on May 20, 1991, IS DENIED, and that the order of the Mobile Services Division denying its request for a tax certificate IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Contel Assignment Application, File No. 04220-CL-TC-90.

[2] *See Public Notice*, Report No. CL-90-70 (released December 22, 1989).

[3] *See* 26 U.S.C. Section 1071(a).

[4] 26 U.S.C. Section 1033.

[5] *See Issuance of Tax Certificates*, 59 FCC 2d 91, 92 (1976); *Policy Statement on Issuance of Tax Certificates*, 92 FCC 2d 170, 171 (1982).

[6] The Commission also determined that it would not issue tax certificates for for cellular markets beyond market 90. *See Nonwireline Cellular Transfers*, 58 Rad. Reg. 2d (P&F) at 1451 n.23.

[7] *See* former 26 U.S.C. Section 1031. The amendment by Congress to Section 1031 that denied non-recognition tax treatment was effective July 18, 1984, and generally applied to transfers made after that date. *See Nonwireline Cellular Transfers*, 58 Rad. Reg. 2d (P&F) at 1444 n.3.

[8] Contel's contention in this regard also amounts to a late request for reconsideration of our determination.

[9] Contel made this statement after asserting that Commission precedent was unclear on whether minority, non-controlling cross ownership interests were precluded. *See* Contel Assignment Application, Exhibit 4.

[10] *See Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, (First Report and Order)*, 6 FCC Rcd 6185 (1991); 56 Fed. Reg. 58503 (1991). *See* Section 22.902(b)(5). *See* Supplement to Application for Review.

[11] *See Request of Contel Cellular, Inc.*, 6 FCC Rcd at 2020, *citing Amendment of Part 22 (CC No. Docket 90-6), (NPRM-Unserved Areas)*, 5 FCC Rcd 1044 (1990) (referring to ". . . longstanding and judicially validated policy favoring separate allocations for wireline and nonwireline mobile systems . . . to foster the development of competing systems . . . ."). *See also First Report and Order*, 6 FCC Rcd at 6228; *Cellular Systems*, 89 FCC 2d at 69-77.

[12] *See Request of Contel Cellular, Inc.*, 6 FCC Rcd at 2080 & n.2, *citing MMM Holdings*, 4 FCC Rcd 6838 (1989); *Communications Industries, Inc.*, Mimeo No. 0770, (Com. Car. Bur. 1985). *McCaw Communications of San Francisco, Inc.*, slip op. (Com. Car. Bur. March 7, 1985); *Advanced Mobile Service (Los Angeles)*, 93 FCC 2d 639, 692 (1983).

Contel also asserts that the decision on its merger with GTE Corporation, which the MSD cites as requiring divestiture of minority cross ownership interests, was released after the assignment in the instant case. *Contel Corp. & GTE Corp.*, 6 FCC Rcd 1003 (1991). That case, however, indicates that Contel recognized our existing policy and offered to divest such an ownership interest where the merged entity would hold a controlling interest in the other frequency block. *Id.* at 1004 & n.6.

Before the
Federal Communications Commission
Washington D. C. 20554

In re Applications of

Radio Seaway, Inc. File No. BRH-890601ZG

For Renewal of License of
Station WCLV(FM)
Cleveland, Ohio

Ardman Broadcasting Corp. of Ohio, Inc. File No. BRH-890511UE

For Renewal of License of
Station WPHR(FM)[1]
Cleveland, Ohio

WOBL Radio, Inc. File No. BR-890522UQ

For Renewal of License of
Station WOBL(AM)
Oberlin, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: August 26, 1992; Released: September 11, 1992

By the Commission:

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I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications from three radio stations in Ohio; (ii) a timely Petition to Deny filed by the Ohio State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), the Cleveland Branch of the NAACP and the National Black Media Coalition (NAACP/NBMC) against the license renewal applications for these radio stations;[2] (iii) oppositions from the licensees; and (iv) the licensees' responses to staff letters of inquiry. NAACP/NBMC allege that the challenged stations violated the Commission's Equal Employment Opportunity (EEO) Rule and policies. Accordingly, they request that the Commission investigate the stations' employment practices and designate the renewal applications for hearing.

II. BACKGROUND

2. *Standing.* The licensees of Stations WPHR(FM) and WOBL challenge NAACP/NBMC's standing as petitioners. They argue that the officers of the Ohio State Conference of Branches of the NAACP and the NBMC did not indicate that they were listeners of the stations or residents of the stations' service areas. In addition, the licensee of WOBL argues that the Ohio State Conference of Branches of the NAACP and NBMC have failed to submit affidavits from a listener to the station or a resident of the station's service area. In challenging an application pursuant to Section 309(d)(1) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. Section 309(d)(1). *See also Astroline Communications Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T.V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition was a declaration under penalty of perjury from the President of the Ohio State Conference of Branches of the NAACP regarding all Ohio stations included in the petition, as well as declarations under penalty of perjury from the President of the Cleveland Branch of the NAACP concerning WCLV(FM) and WPHR(FM) in Cleveland, Ohio. The Commission has held previously that the statement of a person, who does not claim to be a listener of the challenged station or a resident of its service area, does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Applications of KDEN Broadcasting Co. for Renewal of License of Station*

[1] This station's call sign was changed to WENZ(FM) effective May 27, 1992. However, for our purposes here, we refer to this station as WPHR(FM).

[2] In their petition, NAACP/NBMC challenged the renewal applications of a number of stations serving communities in Michigan and Ohio. This Memorandum Opinion & Order (*Order*) addresses only three of the challenged renewal applications. The allegations against the other stations will be addressed in separate orders.

KDEN, Denver, Colorado, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we find that the declaration of the President of the Ohio State Conference of Branches of the NAACP, in failing to claim that he is a resident or listener of any the challenged stations, does not establish standing. However, as to WCLV(FM) and WPHR(FM), the requisite declarations from the President of the Cleveland Branch are provided to establish standing for that branch and for the Ohio State Conference of Branches of the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). We find, therefore, that the challenge filed by the Ohio State Conference of Branches of the NAACP constitutes a valid petition to deny against WCLV(FM) and WPHR(FM).

4. Next, we note that the pleading did not include a statement from NAACP members concerning WOBL, Oberlin, Ohio. Accordingly, we find that the pleading filed by NAACP against this station is insufficient to establish standing and, with respect to this station, NAACP will be considered an informal objector in accordance with 47 C.F.R. Section 73.3584(b).

5. Finally, the pleading contained a statement under penalty of perjury from the chairman of NBMC, Pluria W. Marshall, a resident of the Washington, D.C. area. However, the Commission has held previously that the statement of a person, who does not claim to be a listener of the challenged station or a resident of its service area, does not satisfy the standing requirements of the Act. *See Michigan/Ohio, supra.* Accordingly, we hold that NBMC lacks standing to petition against the above-listed radio stations and we will treat its pleading as an informal objection.

III. PLEADINGS

6. NAACP/NBMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of the licensees' EEO records led us initially to conclude that NAACP/NBMC presented a *prima facie* case demonstrating that unconditional grant of the renewal applications would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1); *Astroline, supra.*

7. However, subsequent review of NAACP/NBMC's EEO allegations as well as each licensee's renewal application, opposition and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that the licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal, but with appropriate remedies.[3]

IV. DISCUSSION

8. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ, and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ, and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b), 73.2080(c).

9. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of remedies or sanctions, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967, (1987), *petition for reconsideration pending; see also* 4 FCC 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir 1988) (*Beaumont*); *Bilingual-Bicultural Coalition v. FCC*, 595 F.2d 621 (D.C. Cir. 1978). (*Bilingual*).

A. WCLV(FM), Cleveland

10. Review of the licensee's 1989 EEO Program Report, opposition and inquiry responses indicates that during the period February 1, 1986, to February 1989, it had nine full-time hiring opportunities, including six upper-level jobs. Outside recruitment sources were contacted for six positions, including three upper-level positions. The referral sources contacted for some of these positions include: Cleveland State University (two Black referrals), Cuyahoga Community College (four Black referrals), Ohio School of Broadcasting, Case Western Reserve University, and Lakeland Community College. In addition, the licensee relied on employee referrals, on-air announcements (two Black referrals), applications on file (two Black referrals), and walk-ins. It interviewed 12 Blacks for seven of the nine positions overall and seven Blacks for five upper-level positions. It hired two Blacks for upper-level positions.[4]

11. NAACP/NBMC criticize the licensee's reliance on general referral sources, noting that it reported only five minority referrals from these sources on the 1989 EEO Program Report. NAACP/NBMC also criticize the licens-

[3] As is our practice in all cases, we reviewed the licensees' efforts towards women; we found their efforts to be sufficient.

[4] The Cleveland MSA, in which the station is located, has a 17.8% minority labor force (15.8% Black, 1.2% Hispanic, 0.7% Asian, 0.1% American Indian). The 1989 Annual Employment Report lists two Blacks among 20 full-time employees overall (10%) and 17 upper-level employees (11.8%). The 1988, 1987 and 1986 reports list one Black among 19 full-time employees (5.3%) and among 16 upper-level employees (6.3%). The 1985 report lists one Black among 17 full-time employees and one Black among 14 upper-level employees (7.1%). The 1984 and 1983 reports list one Black among 16 full-time employees (6.3%) and one Black among 13 upper-level employees (7.7%).

ee's assertion in its EEO Program Report that minority referral sources were not contacted in the last 12 months of the license term because they proved unfruitful.

12. In its opposition, the licensee argues that it consistently employed one minority in an upper-level position during the license term and employed two minorities in upper-level positions in 1989. Also, it seeks out minority applicants for job openings, but the station's stable workforce limits the number of hiring opportunities. In response to NAACP/NBMC's criticism for failure to contact minority sources, it explains that previous contacts with the Urban League and NAACP did not yield any referrals and NAACP/NBMC have not identified any other possible sources. Thus, it decided to concentrate its efforts on educational institutions which consistently furnish minority referrals.[5]

13. Our analysis indicates that there are no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* Further, we find no evidence that the licensee engaged in discrimination or failed to engage in adequate efforts. It recruited, interviewed and hired Black applicants for its relatively small number of full-time positions. It employed at least one minority full-time in an upper-level position throughout the license term and monitored the effectiveness of its EEO program, making meaningful modifications as needed. WCLV's EEO program contained no minority recruitment sources. However, if, as here, a licensee obtains a meaningful pool of referrals and applications from reliance on general sources, it will not be faulted for failing to contact minority specific sources. *Application of Certain Broadcast Stations Serving Communities in the State of South Carolina,* 5 FCC Rcd 1704, 1709 n.8 (1990). Based on the foregoing, we will grant renewal without conditions.

B. WPHR(FM), Cleveland[6]

14. Review of the 1989 EEO Program Report, opposition and inquiry response indicates that during the period December 15, 1987,[7] to June 1, 1989, the licensee had 31 full-time hiring opportunities, including 29 for upper-level jobs.[8] The following referral sources were contacted for some positions during this period: *Plain Dealer* (four minority referrals), *Sun,* Talent Masters (one minority referral), Cleveland State University, Cuyahoga Community College, *Call & Post* (nine minority referrals), Ohio Bureau of Employment Services (one minority referral), Kent State University, and *Mansfield News Journal.* In addition, the licensee relied on employee notices (two minority referrals), business referrals, previous station management, walk-ins, and other stations. It interviewed 11 minorities (nine Blacks, two Hispanics) for 11 of the 31 full-time positions, including seven Blacks for nine of the 29 upper-level positions. Two Blacks were hired for upper-level positions and one Hispanic for a clerical position.[9]

15. NAACP/NBMC allege that the licensee disregarded its 1987 Model EEO proposals to contact five referral sources, including Black Media Workers of Cleveland and the UNCF Committee. NAACP/NBMC also note that no such contacts were reported in the 1989 program and only two minorities were among the 16 reported hires for upper-level positions during the reporting year.

16. The licensee argues that it has an excellent EEO program which resulted in employment of minorities in percentages meeting or nearly doubling the Commission's minimum guidelines. It indicates that it routinely circulated announcements to station employees and sent them to educational institutions with significant minority and female enrollments as well as to a state employment agency. Additionally, it asserts that advertisements are placed in area newspapers including *Call & Post,* an inner city Black newspaper. With respect to the proposed recruitment organizations listed in the Model EEO program as part of the assignment application, the licensee states that they were intended as "examples" and it has used the majority of the minority referral sources listed in the Model EEO program. With respect to the two Black organizations mentioned by NAACP/NBMC, the licensee states that it has found it unnecessary to contact those organizations and argues that its recruitment efforts have resulted in the consideration of large numbers of minority applicants. It notes that the percentages of minority applicants and interviewees for most job vacancies have been near full parity, have exceeded parity, or in some cases have been twice that of full parity. Furthermore, the licensee asserts that it actively interviews minorities who have applied for positions at the stations and that it has nearly attained "the goal of full parity with its labor force" as a result of its EEO efforts.

17. Upon analysis of the licensee's opposition and inquiry response, we find that there are no substantial and material questions of fact warranting designation for hear-

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[5] In response to subsequent inquiries concerning this issue, the licensee explained that, at the beginning of the license term, it periodically contacted 15 different minority and community service organizations, including Womenspace; NAACP; American Indian Center; Japanese American Citizens League; and the Chinese Cultural Center. The licensee states that it received no referrals from these sources and, consequently, ceased contact with them in the second year of the license term.

[6] In conjunction with this application, NAACP/NBMC requested that we require the early filing of the renewal application of Station WZOU(FM), Boston, Massachusetts, which is owned by the same licensee. NAACP/NBMC's sole basis for this request is the absence of minorities from the station's full-time work force during the licensee's first two years of ownership as reflected in WZOU(FM)'s annual employment reports. The license renewal for WZOU(FM) subsequently came up for review on its regular renewal cycle and was unchallenged by NAACP/NBMC. After reviewing WZOU(FM)'s EEO program, including its annual employment reports, the Commission unconditionally granted the licensee's renewal application on December 12, 1991. Therefore, petitioners' request is moot.

[7] Ardman Broacasting Corporation of Ohio acquired Station WPHR(FM) on December 15, 1987.

[8] In its inquiry response, the licensee lists a traffic manager position as one of its upper-level managerial positions. Generally, the responsibilities and duties of traffic managers fit within the definition of office and clerical workers. *See* Instructions for Completion of the FCC Form 395-B Broadcast Station Annual Employment Report, Section 7(e).

[9] The Cleveland MSA, in which the station is located, has a 17.8% minority labor force (15.8% Black, 1.2% Hispanic, 0.7% Asian, 0.1% American Indian). The 1989 Annual Employment Report lists two Blacks (8.3%) and two Hispanics among 24 full-time employees overall and two Blacks (9.55) among 21 upper-level employees. The 1988 report lists one Black (4.8%) and one Hispanic among 23 full-time employees overall and one Black (4.8%) among 21 upper-level employees.

ing, *Astroline, supra*. Further, because the licensee attracted and hired minorities, we find no evidence that the licensee engaged in discrimination. We therefore find that grant of renewal is in the public interest. However, our review has raised some concerns regarding the licensee's overall efforts. Accordingly, we will grant renewal subject to reporting conditions.

18. Our review indicates that although the licensee attracted and hired a significant number of minorities, it failed to contact outside referral sources for 20 of 31 full-time positions. Indeed, the licensee apparently did not begin affirmative recruitment for job vacancies until the reporting year. From December 15, 1987, to June 1, 1988, it contacted an outside recruitment source for only two of 15 vacancies for full-time positions. During the reporting year, June 1, 1988, to June 1, 1989, it contacted outside recruitment sources for only nine of 16 full-time positions. For the remaining 20 vacancies, it relied solely on employee notices and a business referral. The licensee provides no explanation for its sole reliance on employee notices for so many positions, particularly when minorities appeared in only three interview pools when this was the sole source used.

19. We find the EEO record in this case similar to that of Stations WPNT(AM)/WPNT-FM in Chicago, Illinois, *Applications of Century Chicago Broadcasting, Ltd. for Renewal of Licenses of Stations WPNT(AM)/WPNT-FM*, 6 FCC Rcd 7246 (1991), in which we granted renewal subject to reporting conditions. The licensee of WPNT/WPNT-FM failed to affirmatively recruit for 29 of 39 positions, having used its recruitment list for only 10 vacancies. For the remaining 29 positions, it relied on resumes and audition tapes on file, industrial referrals and employee referrals. It interviewed 13 minorities for 13 full-time positions overall, including five minorities for 10 upper-level positions. The licensee hired three Blacks in an area with a 17.3% Black labor force.

20. Like WPNT/WPNT-FM, the licensee failed to actively recruit for the majority of its full-time positions, relying instead on employees notices for 20 of its 31 vacancies. The licensee of WPHR(FM) interviewed and hired minorities for full-time positions. In addition, it places undue emphasis on meeting our processing guidelines without consideration of its failure to consistently engage in efforts to attract qualified minorities whenever vacancies occur.[10] Accordingly, in order to ensure that the licensee of WPHR(FM) consistently engages in meaningful efforts to attract qualified minorities when vacancies occur, we will impose reporting conditions.

C. WOBL(AM), Oberlin

21. Review of the 1989 EEO Program Report, opposition and inquiry responses indicates that the licensee had 25 full-time hiring opportunities, including 23 for upper-level jobs during the period June 1, 1986, to June 1, 1989. For 14 positions, the licensee contacted the following recruitment sources: *Lorain Journal* (five minority referrals), *Elyria Chronicle Telegram* (three minority referrals), Lorain County Joint Vocational Center, Kent State University, Lorain Business School, "area businessmen and community leaders," Lorain County Community College, Electronic Servicing Institute and *Oberlin News Tribune*.[11] In addition, the licensee relied on employee referrals (two minority referrals), walk-ins and solicited applicants.[12] The licensee interviewed eight minorities (five Blacks, two Hispanics and one Asian) for seven upper-level positions and hired two Hispanics for upper-level positions.[13] The EEO Program Report reveals that the licensee has embarked on a program with the County Employment Bureau to refer job applicants to the station when jobs are available. Further, it encourages local high schools to include the station in their career day activities in the hopes of seeking candidates for job openings. As part of its self-assessment, the licensee states in its EEO Program Report that it will send periodic letters to county educational and retraining organizations seeking candidates for job openings, and use on-air advertisements of job openings as part of its recruitment efforts. The licensee notes that it has encountered problems retaining minorities and women due to its considerably lower wages as compared to the larger Cleveland market.[14]

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[10] In this regard, we remind the licensee that meeting or exceeding our processing guidelines is not a safe harbor. *See Catawba Valley Broadcasting*, 3 FCC Rcd 1930 (1988).

[11] The licensee also submitted letters from the Urban League, Oberlin College and the Lorain County Private Industry Council regarding the licensee's EEO efforts. The referral sources generally indicate that the licensee has offered employment to area students and has used their services to seek out qualified minority applicants. However, the licensee's record reflects no evidence that these sources were contacted for specific vacancies.

[12] In addition, the licensee states that it received one minority referral from "business, social and charitable organizations."

[13] The licensee states that it interviewed three minorities, hired and continues to employ a Hispanic in a traffic manager position which it lists as an upper-level managerial position. Generally, the responsibilities and duties of traffic managers fit within the definition of office and clerical workers. *See* Instructions for Completion of FCC Form 395-B Broadcast Station Annual Employment Report, Section 7(e).

[14] The Lorain-Elyria MSA, in which the station is located, has a 10.7% minority labor force (6.2% Black 3.9% Hispanic, 0.4% Asian, 0.2% American Indian). The 1989 Annual Employment Report lists two (11.8%) Hispanics among 17 full-time employees. The 1988 report lists one (6.3%) Hispanic and one American Indian among 16 full-time employees. The 1987 report lists one (5.9%) Hispanic and one American Indian among 17 full-time employees. The 1986 report lists one (8.3%) American Indian among 12 full-time employees. The 1985 report lists one (9.1%) Hispanic among 11 full-time employees. The 1984 report lists one (11.1%) Hispanic among nine full-time employees. The 1983 report lists no minorities among ten full-time employees. All full-time employees reported on the Annual Employment Reports held upper-level positions.

> The licensee indicates that due to a misunderstanding, it incorrectly omitted several minority employees from its reports. These omissions include an American Indian full-time employee from its 1986, 1987 and 1988 reports and an Hispanic full-time employee from its 1987, 1988 and 1989 reports. The licensee explains that it did not understand that it could routinely inquire into the ethnic background of its employees. The licensee's corrections have been included in the above discussion of its employment profile.

22. NAACP/NBMC assert that the licensee's program is "EEO neutral." Specifically, they criticize the licensee's failure to use minority organizations, the Oberlin College Communications Department which they state has a high minority enrollment, and CETA as recruitment sources.

23. In opposition, the licensee argues that NAACP/NBMC's petition is based on inaccurate data provided in its annual employment reports. It argues that when the correct data is considered, the minority composition of the full-time and upper-level job categories substantially exceeded the Commission's guidelines with the exception of 1983 to early 1984. Next, the licensee disputes NAACP/NBMC's assertion that its program is "EEO neutral." As support, it claims that it uses a number of educational institutions, all of which have considerable minority representations in their student bodies.[15] In addition to contacting recruitment sources, the licensee states that it encourages its employees to inform minorities of its EEO program when speaking at schools and organizations. Lastly, the licensee explains that its problems attracting minorities are due to its low wage scales and its inability to compete with stations in the larger Cleveland, Ohio market.

24. Our analysis indicates that there are no substantial and material questions of fact warranting designation for hearing. *Astroline, supra.* Further, the licensee attracted and hired minorities and we find no evidence that the licensee engaged in discrimination. However, we are concerned with the licensee's EEO efforts. Accordingly, we will grant renewal subject to reporting conditions.

25. Review of the licensee's 1989 EEO Program Report, its opposition and its inquiry responses reveals that it contacted outside referral sources for only 14 of its 25 full-time positions. We note that the licensee hired two Hispanics for upper-level positions during the three-year period under review and employs two Hispanics among its overall staff of 17. Although the Commission considers a station's overall minority employment in determining EEO compliance, we evaluate principally a station's efforts directed toward the dominant minority group in the labor force or non-dominant minorities that are present in the workforce in significant numbers. *Bilingual,* at 625; *Renewal of License of Station WTHZ-FM, Tallahassee, FL,* 5 FCC Rcd 7695, 7696 (1990); *Applications for Renewal of Licenses of WBBE(AM)/WMGB-FM, Georgetown, Kentucky,* 4 FCC Rcd 8255, 8256 (1989). Hispanics comprise only 3.9% of the Lorain-Elyria, OH, MSA while Blacks, the dominant minority group, comprise 6.2%. The licensee did little to apprise sources likely to refer Black applicants of job opportunities. Although the licensee attracted some Black applicants, they were present in only six applicant pools. Further, the licensee does not even discuss the absence of Blacks nor does it propose any modifications to its program to improve its recruitment efforts with respect to Blacks, the dominant minority group in the labor force.

26. The licensee's record is similar to those of WFBR, Baltimore, Maryland and WCOA(AM)/WJLQ-FM, Pensacola, Florida, *The Baltimore Radio Show, Inc.,* 3 FCC Rcd 5913 (1988); *Application for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area,* 5 FCC Rcd 6738 (1990), in which we imposed reporting conditions. In *WFBR,* the licensee did not recruit for seven of 15 hiring opportunities and took no steps to modify its program despite an underrepresentation of Blacks on its upper-level work force. In *WCOA(AM)/WJLQ-FM,* the licensee actively recruited for only 12 of its 36 full-time positions. In addition, the licensee did not modify its recruitment efforts despite its record of attracting minorities for only four of its 36 applicant pools overall, including only three of its 33 upper-level applicant pools.

27. Similarly, in the instant case, the licensee failed to contact recruitment sources for a significant number of hiring opportunities. In addition, the licensee here failed to modify its EEO program despite an absence of Blacks from its full-time staff throughout the license term and a failure to attract Blacks for no more than six interview pools. Accordingly, to ensure that the licensee engages in affirmative efforts to recruit when vacancies occur and engages in meaningful self-assessment, we will grant renewal subject to reporting conditions.

V. CONCLUSION

28. After reviewing the evidence and arguments submitted by NAACP/NBMC and all licensees, we find that hearings are not warranted and the records of the licensees support the granting of all of their renewal applications. With respect to Station WCLV(FM), unconditional grant of its renewal application is warranted. Because of concerns about future affirmative action efforts, however, reporting conditions are warranted for WPHR(FM) and WOBL(AM).

VI. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED, that the petition to deny filed by the NAACP against WCLV(FM) and WPHR(FM) IS DENIED.

30. IT IS FURTHER ORDERED, that the petition to deny filed by the NAACP against WOBL(AM) IS DISMISSED and when considered as an informal objection IS DENIED.

31. IT IS FURTHER ORDERED, that the petition to deny filed by the NBMC IS DISMISSED and when considered as an informal objection IS DENIED.

32. IT IS FURTHER ORDERED, that the renewal application filed by Radio Seaway, Inc. for Station WCLV(FM) IS GRANTED.

33. IT IS FURTHER ORDERED, that the renewal applications filed by Ardman Broadcasting Corporation of Ohio, Inc. for WPHR(FM) and WOBL Radio, Inc. for WOBL(AM) ARE GRANTED subject to the reporting conditions described herein.

[15] In addition, the licensee states that it uses Oberlin College's Communications Department as a referral source, however the department apparently has not produced any referrals. With respect to CETA, the licensee states that it dropped this source because it failed to refer any applicants.

34. IT IS FURTHER ORDERED, that the licensees of WPHR(FM) and WOBL(AM) submit to the Commission an original and one copy of the following information on June 1, 1993, June 1, 1994, and June 1, 1995:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title; 395-B job classification and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. This list should also note which recruitment sources contacted;[16]

(b) A list of employees as of the May 1, 1993 payroll period for the first report and as of the May 1, 1994 and May 1, 1995 payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid classification), date of hire, sex, and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

35. The reports are to filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action or require further information concerning the employment reports, they may telephone the Mass Media Bureau's EEO Branch. (202) 632-7069.

36. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[16] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A. W. R. T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A. W. R. T., Urban League, and NAACP

Selected: Black male (03/15/92)

Before the
Federal Communications Commission
Washington D. C. 20554

In re Application of

Michael L. Glaser d/b/a SAINT VRAIN COMMUNICATIONS CO — File No. BPH-900228MA

For a Construction Permit for
a New FM Broadcast Station on
Channel 282C1 at Longmont, Colorado

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1992; Released: September 10, 1992

By The Commission

1. The Commission has before it (a) a Petition for Reconsideration, filed on November 21, 1990, by Michael L. Glaser d/b/a Saint Vrain Communications Co. ("Saint Vrain");[1] (b) oppositions filed on December 5, 1990, by Longmont Broadcasting Corporation and Western Cities Broadcasting, Inc.; and on December 6, 1990, by Amador S. Bustos and (c) a Consolidated Reply to the oppositions, filed on December 18, 1990, by Saint Vrain. Saint Vrain seeks reversal of the staff action returning its above-captioned application as insufficient for tender.

BACKGROUND

2. By letter dated April 3, 1990, the Commission staff returned Saint Vrain's application as insufficient for tender because it lacked a transmitter site availability certification. The letter also informed Saint Vrain that its March 5, 1990, amendment providing a site certification could not be considered because it was filed after the close of the relevant filing window.

3. On May 7, 1990, Saint Vrain filed a Petition for Reconsideration and Reinstatement of Application *Nunc Pro Tunc*. That appeal, however, was denied by the staff in *Hearing Designation Order*, 5 FCC Rcd 6177 (M. M. Bur. 1990). Saint Vrain now seeks relief from the Commission.

4. Saint Vrain argues that: (a) the application of the Commission's "hard look" policy to Saint Vrain is arbitrary, capricious, and an abuse of discretion because that policy was never intended to apply to applications filed in competition with license renewal applications; (b) the "hard look" policy was void *ab initio* because it bears no rational relationship to its stated purpose; (c) the "hard look" policy has been voided by subsequent actions depriving it of any rational relationship to its stated purpose; (d) the absence of a site certification generally is not a tenderability defect in applications filed in contested commercial FM license renewal proceedings, given the elimination of the *Cameron* doctrine; (e) the absence of a site certification also did not constitute a tenderability defect for Saint Vrain because the necessary information as to Saint Vrain's proposed transmitter site could have been derived from the "four corners" of its application and the Commission's own files; and (f) the "hard look" policy is unconstitutional because it violates an applicant's right to equal protection under the law.

5. Saint Vrain's contention that the "hard look" policy[2] was not intended to apply to applications filed in competition with license renewal applications is without merit.[3] In Appendix D to the *Report and Order*, reported at 58 RR 2d 166 (1985), we did not distinguish between FM applications subject to the "window" filing procedures and those filed in competition with renewals. We did state that: "At the time an application for a commercial FM station or for a modification to an existing commercial FM station is tendered ... the application will be given a thorough initial review to determine if it is substantially complete."58 RR 2d at 166. Moreover, we stated that in light of the reduction in the amount of information applicants were required to submit, we considered certifications, including the site certification, to be "crucial." 58 RR 2d at 167. We clearly warned that the failure to provide the site certification or other information specified in Appendix D would result in the application being "returned as not sufficient for tender." 58 RR 2d at 169. *See e.g., Ann D. Genthner*, 1 FCC Rcd 399 (1986) and *Fred R. Morton, Jr.*, 5 FCC Rcd 606 (1990). In addition, Appendix D provided a detailed list of the criteria utilized by the staff in evaluating the substantial completeness of applications and stated that the failure to include a site certification would render an application insufficient for tender and result in return of the application. Thus, Saint Vrain was on notice that its application had to comply with general FM processing requirements and that failure to comply with those requirements would result in the return of its application.[4] Saint Vrain's further contention that the "hard look" policy was only intended to apply to applications filed for vacant allotments is belied by the fact that applications for modifications to existing commercial FM stations are also subject to the "hard look" tenderability review. 58 RR 2d at 166.

6. Saint Vrain claims that there is no rational connection between tenderability review and our goal, as stated in the *Report and Order*, of expediting the processing of ap-

[1] Pursuant to 47 C.F.R. Section 1.115, Saint Vrain's petition will be treated as an application for review.

[2] *See Report and Order in MM Docket No. 84-750*, 58 RR 2d 776 (1985)(hereinafter *"Report and Order"*).

[3] The Commission recently modified the "hard look" processing rules, and made these rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No 91-437, 7 FCC Rcd _____ (adopted July 16, 1992). The Commission determined that applications filed prior to that date will continue to be processed under the rules in effect on the date of the application's receipt.

[4] We have expressly rejected the contention that an application which is mutually exclusive with a renewal application should be subject to different processing standards than one that is not. *K & L Communications , Inc.*, 46 RR 2d 356, 357 (1979).We have uniformly made the "hard look" applicable to new stations and comparative renewal cases, both as the system was originally adopted and as it was modified from time to time. *See Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 3854, 3859, n.71 (1989) (applying new financial certification tenderability requirement to all FM applications filed on Form 301).

plications tendered by qualified applicants. An applicant, Saint Vrain contends, may be ready, willing and able to bring service to the public despite a tenderability error in its application. In the *Report and Order* we made clear that our policy objectives were: "expediting service to the public and minimizing administrative costs...." 58 RR 2d at 779. The failure of an applicant, such as Saint Vrain, to provide all of the information called for by the application form interferes with the staff's ability to expeditiously process applications and requires an unnecessary expenditure of Commission resources. Thus, the processing of Saint Vrain's application would be contrary to our goals.

7. Saint Vrain notes that, with a slow down in the filing of FM applications, we have authorized the staff to waive the "hard look" processing of applications in certain situations.[5] *FM Applications ("Hard look" Processing Procedures)*, 67 RR 2d 494 (1990). In doing so, Saint Vrain contends, the Commission has voided its "hard look" policy. Saint Vrain, however, ignores the fact that in waiving the "hard look" processing in certain circumstances, we specifically stated that we were otherwise retaining the "hard look" policy because it allows the staff to return defective applications and concentrate their limited time and resources on grantable applications. Here, Saint Vrain's application, which did not include a site certification, was not substantially complete under our "hard look" processing standards.

8. Saint Vrain further claims that the abolition of the "Cameron" presumption (*see George E. Cameron, Jr. Communications* 71 FCC 2d 460, 467 (1979)) in *Broadcast Renewal Applicants*, 4 FCC Rcd 4780, 4788-89 (1989), eliminated the need for applicants competing with renewal applicants to certify the availability of their proposed antenna sites. In support, Saint Vrain notes that, in abolishing the "Cameron" presumption, we stated that if a renewal challenger could not provide reasonable assurance of a transmitter site, an appropriate issue would be designated. Nowhere, however, did we excuse renewal challengers from providing site certification either in the affirmative or negative as to the availability of the site specified in their applications. In fact, we specifically indicated that, in limited circumstances, a challenger without reasonable assurance of site availability would be designated for hearing if it "state[s] on the application that it does not have reasonable assurance...." 4 FCC Rcd at 4789. Thus, while a negative certification might have resulted in the designation of the Saint Vrain application for hearing, Saint Vrain failed to include any certification, either affirmative or negative. Under these circumstances, dismissal was appropriate.

9. Moreover, contrary to Saint Vrain's claims, the mere reference to a site in an application is not the equivalent of a site certification. The purpose of the site certification is to obtain from the applicant an assurance that the applicant has contacted the owner of the site and has obtained reasonable assurance, in good faith, that the proposed site will be available for the intended purpose. *Instructions to FCC Form 301*, for Section 7 certifications. The specification of a site, standing alone, does not provide the assurance of the applicant called for by the site certification. Consequently, absent this certification the Saint Vrain application was incomplete as filed and the staff dismissal was warranted.

10. Finally, Saint Vrain claims that the "hard look" review violates its constitutional right to equal protection under the law because the policy is not applied to applicants for other broadcast services. In establishing this policy, however, we explained that the procedural changes would apply only to FM commercial applications because those applications had the greatest backlog. *Report and Order*, 58 RR 2d at 778 (1985). In *Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), the court upheld the Commission's application of a "letter perfect" standard for the Low Power Television Service. In doing so, the court found that the imposition of the higher standard was a reasonable exercise of discretion in light of the high number of applications filed and the Commission's limited resources. This rationale also underlies our imposition of the "hard look" policy to FM applications. *See Malkan FM Associates*, 935 F.2d 1313 (D.C. Cir. 1991) (affirming dismissal of FM applications pursuant to "hard look" processing standards).

11. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed by Saint Vrain on November 21, 1990, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[5] Those situations are where only one applicant has applied in a filing window, or where an applicant, including one whose dismissal is not final, proposes to buy out all other applicants.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-184

In re Applications of

STEPHEN D. TARKENTON	File No. BPH-900417MU
TAYLOR BROADCASTING, LP	File No. BPH-900418MJ
SOUTH CENTRAL BROADCASTING COMPANY	File No. BPH-900418MK

For Construction Permit for
New FM Station, Channel 223A,
(92.5 MHz) in Zebulon, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: August 21, 1992; Released: September 10, 1992

By the Commission:

1. The Commission has before it a decision of the Review Board dismissing Design Media Inc.'s (DMI) September 27, 1991,[1] pleading styled "Application for Review" filed pursuant to 47 C.F.R. § 1.115.[2] *Memorandum Opinion and Order*, 7 FCC Rcd 1357 (Rev. Bd. 1992) (*MO&O*). The pleading sought review of a decision of Administrative Law Judge Edward Luton (ALJ), which approved a settlement agreement among applicants for a new FM station at Zebulon, Georgia, and granted the application of Spalding Broadcasting, L.P. (Spalding), a new partnership formed by the merger of Stephen D. Tarkenton (Tarkenton) and South Central Broadcasting Company. *Memorandum Opinion and Order*, FCC 91M-2809, released September 12, 1991. The Review Board dismissed DMI's pleading and also declined to review the ALJ's decision on its own motion. We agree with the Board's disposition of this matter.[3]

2. Though DMI styled its September 27 pleading as an Application for Review filed pursuant to 47 C.F.R. § 1.115, it is effectively an appeal of the ALJ's decision under 47 C.F.R. § 1.302. As the Review Board noted, that rule authorizes appeals only by parties. DMI neither participated initially as a party to the proceeding nor has it ever petitioned to intervene. Thus it has no standing to challenge the ALJ's decision. DMI's contention that its pleading should have been accepted pursuant to the provisions of 47 C.F.R. § 1.115 is erroneous. Section 1.115 of our rules governs procedures for review of actions "taken pursuant to delegated authority." An ALJ ruling terminating a proceeding does not fall within the ambit of "actions taken pursuant to delegated authority." *Carroll, Carroll, & Rowland*, 4 FCC Rcd 7149 ¶ 5 (Rev. Bd. 1989) (distinguishing between actions taken pursuant to delegated authority and ALJ actions taken by virtue of his authority to control the course and conduct of the hearing).[4]

3. Nor is there merit to DMI's contention that the Commission should consider on its own motion whether the ALJ's action approving the settlement agreement among the Zebulon applicants and granting the Spalding application was in the public interest. DMI has not attempted to argue that there is any indication that the ALJ committed reversible error in reviewing the record before him and reaching a decision on the basis of that record. The crux of DMI's pleading is that information it discovered *after* release of the ALJ's decision must be taken into account in the proceeding because it raises questions as to whether Stephen Tarkenton's father, Dallas Tarkenton, is an undisclosed party-in-interest in the Zebulon application.[5] However, the information DMI has submitted is not sufficient to raise a substantial and material question of fact as to whether Dallas may be the real-party-in-interest in the application and does not merit reopening the proceeding for further hearings.[6]

4. DMI's other allegations concern Dallas' conduct in other proceedings, and, with one exception, vis-a-vis children other than Stephen. These allegations are all under investigation by the Mass Media Bureau,[7] and the Bureau has also concluded that the evidence before it at this point

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[1] The pleading was supplemented on November 21, 1991.

[2] Section 1.115 of our rules provides, in pertinent part, that any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission.

[3] Now before the Commission are an Application for Review filed on March 11, 1992 by DMI, an Opposition to Application for Review and Request for Expedited Action filed on March 26, 1992 by Stephen D. Tarkenton, and an Opposition to Application for Review filed on March 26, 1992 by the Mass Media Bureau.

[4] The ALJ's authority stems from section 7 of the Administrative Procedure Act, 5 U.S.C. § 556, and section 409 of the Communications Act, 47 U.S.C. § 409, rather than from a delegation of authority by the Commission.

[5] As noted, Spalding is a partnership resulting from the merger of Stephen Tarkenton and South Central. Stephen Tarkenton is the sole general partner in Spalding.

[6] In support of the undisclosed party-in-interest allegation, DMI submits that the record shows (i) Dallas will be providing financing for the Zebulon station and (ii) certain documents submitted with the Zebulon application are identical in style, format, etc. to documents submitted by Dallas in other proceedings. *See* 7 FCC Rcd at 1357 ¶ 2. However, the provision of financing by a father to a son is not uncommon, and, given the familial relationship, does not without more support a conclusion that a real-party-in-interest issue exists. *Magdalene Gunden Partnership*, 2 FCC Rcd 5513, 5516 (Rev. Bd. 1987), *rev. den.* 3 FCC Rcd 7186 (1988) (subsequent history omitted). Similarly, it is consistent with the familial relationship that Dallas and Tarkenton used the same consulting firm and that exhibits and amendments to their applications therefore appeared similar.

[7] *See* January 29, 1992 letter from Charles W. Kelley, Chief, Enforcement Division to John S. Neely, Esq., Ref. No. GPS/7212. DMI requests that, if the Commission declines to remand this case for further hearing, it expand the ongoing investigation to include the Zebulon proceeding. The Zebulon application is already within the scope of the investigation,

does not indicate that Dallas Tarkenton has an ownership interest in his son's application, that he can control the station, or that the wrong-doing alleged by DMI concerning the other stations necessarily implicates the Zebulon application. 7 FCC Rcd at 1358 ¶ 4. Nevertheless, if that investigation suggests a problem exists, we can initiate revocation proceedings against the Zebulon permittee. In the meantime, as the Review Board noted, if DMI discovers information that it believes further supports a Zebulon real-party-in-interest charge, it can file an informal objection seeking revocation of the Zebulon construction permit or denial of Spalding's application for a license.

5. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the application for review filed March 11, 1992, by Design Media, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

which is "concerned [with] the nature, and extent, if any, of Dallas M. Tarkenton's involvement in the applications for FCC authorizations filed by his sons." Letter of Inquiry at p. 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of	
BETH KNIGHT	File No. BPH-880516MA
LUCINDA FELICIA PAULOS	File No. BPH-880518MB
BODEGA COMMUNICATIONS, INC.	File No. BPH-880519MD
JOHN A. CAROLLO, JR.	File No. BPH-880519MX
MANZANITA MEDIA, INC.	File No. BPH-880519NR

For Construction Permit for
New FM Station, Channel 229
(93.7 MHz) in Sebastopol, California

MEMORANDUM OPINION AND ORDER

Adopted: August 24, 1992; Released: September 10, 1992

By the Commission:

1. Subsequent to receiving a joint Petition to Enlarge Issues Against Beth Knight filed by two parties in this five party comparative case, Administrative Law Judge Richard Sippel (ALJ) reopened the record and added financial qualifications issues against Beth Knight (Knight). *Memorandum Opinion and Order*, FCC 91M-3072, released October 11, 1991. Knight filed a request for leave to appeal the ALJ's ruling adding the issues, and the ALJ denied that request. *Memorandum Opinion and Order*, FCC 91M-3259, released November 12, 1991. Knight then filed a Statement for the Record indicating that she would not present any evidence on the financial qualifications issue because she could not afford the expense of litigation. The ALJ dismissed Knight's application for failure of proof and failure to prosecute on the financial issues specified against her. *Memorandum Opinion and Order*, FCC 91M-3465, released December 19, 1991. The Review Board affirmed the ALJ's decision. *Memorandum Opinion and Order*, 7 FCC Rcd 1889 (Rev. Bd. 1992).

2. Before us are an Application for Review filed April 1, 1992 by Knight and an Opposition to Application for Review filed April 16, 1992 by John A. Carollo, Jr. After reviewing the pleadings and record in this case, we agree with the Review Board that the ALJ acted within the broad discretion afforded him in hearing matters when he designated the financial qualifications issues against Knight[1] and that dismissal of Knight's application for failure of proof and failure to prosecute was proper. *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 4633 (Rev. Bd. 1991), *review denied*, 7 FCC Rcd 1662 (1992).

3. ACCORDINGLY IT IS ORDERED, That, pursuant to 47 C.F.R. section 1.115(g), the application for review filed April 1, 1992 by Beth Knight IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Knight argues that there is no rational basis for addition of the issues. We disagree. Knight's reliance on shifting sources to fund prosecution expenses, coupled with uncertain loan and contingency fee arrangements which may total a $75,000 indebtedness for Knight and with Knight's own uncertain financial resources, provided an ample basis for the ALJ to find that substantial and material questions of fact had been raised as to her financial qualifications.

Before the
Federal Communications Commission
Washington D. C. 20554

In the Matter of

Notice of Forfeiture
Issued to Dakos Broadcasting, Inc.
For Stations WOKD(AM)/WXKT(FM),
Arcadia, Florida

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1992; Released: September 10, 1992

By the Commission:

1. The Commission has before it a petition for reconsideration filed by Dr. William N. Dakos, president of Dakos Broadcasting, Inc. (Dakos), former licensee of WOKD(AM)/WXKT(FM),[1] in response to the Forfeiture Order for $18,000 issued on February 24, 1992, in *Notice of Apparent Liability for Forfeiture Issued to Dakos Broadcasting, Inc., for Stations WOKD/WXKT(FM), Arcadia, Florida*, 7 FCC Rcd 1592 (1992) (*NOF*). In the *NOF*, we imposed a forfeiture because Dakos failed to respond to the NAL issued on June 21, 1990, for violations of the Commission's Equal Employment Opportunity (EEO) Rule, 47 C.F.R. Section 73.2080. In its petition, Dakos requests that the Commission reduce the amount of the forfeiture.

2. Dakos states that it did not receive official notice of the *NOF* in a timely manner and, thus, did not have enough time to respond adequately. Dakos contends that, because of the passage of time, it is difficult to locate records and personnel that might refute the Commission's findings. Therefore, Dakos argues that the Commission should mitigate the amount of the forfeiture. Upon review of the petition, the Commission staff asked Dakos if it intended to supplement its one-page response. Dakos informed the staff that its response was complete and it would submit no additional information.

3. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioners' last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106(c).

4. After reviewing Dakos' pleading, we find that Dakos failed to present any evidence to support its contention that the forfeiture should be reduced. Its pleading fails to present any evidence upon which reconsideration may be granted. Moreover, Dakos' claim of insufficient time to respond to the *NOF* is without merit. When asked by the Commission staff whether it intended to supplement the one-page pleading, Dakos responded that it would submit no additional information. Thus, Dakos was given ample opportunity to submit additional information. Accordingly, Dakos' petition for reconsideration is denied.

5. Accordingly, IT IS ORDERED, that the petition for reconsideration of the forfeiture is DENIED, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503 (b), that Dakos Broadcasting, Inc. FORFEIT to the United States the sum of eighteen thousand dollars ($18,000) for the wilful and repeated violation of the Commission's affirmative action provisions. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission.

6. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail – Return Receipt Requested – one copy of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] Before renewing the stations' licenses, the Commission granted assignments of the licenses to Gulf Dunes Broadcasting, Inc. The new licensee changed the call letters of the stations from WAPG(AM) to WOKD(AM), then to WKGF(AM), and from WOKD(FM) to WXKT(FM), then back to WOKD(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-108

In re Applications of

SUMTER RADIO PARTNERS — File No. BPH-880310NM

IRIS COMMUNICATIONS, INC. — File No BPH-880310NS

For Construction Permit
for a New FM Station on
Channel 234A at Sumter,
South Carolina

ORDER

Adopted: August 31, 1992; Released: September 10, 1992

By the Commission:

1. Now before the Commission are a Review Board decision, *Sumter Radio Partnership*, 7 FCC Rcd 2573 (Rev. Bd. 1992); an Application for Review filed June 1, 1992 by Sumter Radio Partners and an opposition filed June 16, 1992 by Iris Communications, Inc. We agree with the Board's resolution of this case, and we affirm the Board's grant of Iris's application.

2. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed June 1, 1992 by Sumter Radio Partners IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

License Renewal Application of
Dolcom Broadcasting, Inc.
For Station WUMX(FM)
(formerly WTHZ-FM)
Tallahassee, Florida

File No. BRH-880928UB

NOTICE OF FORFEITURE

Adopted: August 28, 1992; Released: September 14, 1992

By the Commission: Commissioner Quello concurring and issuing a separate statement.

I. INTRODUCTION

1. The Commission has before it for consideration a statement from the Vice President of Dolcom Broadcasting, Inc. (Dolcom) requesting elimination or reduction of the Notice of Apparent Liability (NAL) issued to Dolcom, licensee of WUMX(FM) (then called WTHZ-FM) in *Letter to Howard B. Dolgoff, Vice President/General Manager, Station WTHZ-FM, Re: Renewal of License of Station WTHZ-FM, Tallahassee, Florida*, 5 FCC Rcd 7695 (1990) (*WTHZ-FM*). In *WTHZ-FM*, we concluded that the licensee's failure to comply with the Commission's EEO Rule warranted a short-term renewal subject to reporting conditions and a Notice of Apparent Liability in the amount of $18,000.[1] *See* 47 C.F.R. Section 73.2080.

II. BACKGROUND

2. Our decision in *WTHZ-FM* describes the licensee's failure to engage in adequate EEO efforts. Review of the licensee's renewal application and inquiry response revealed that it failed to recruit minorities or self-assess its EEO program until the last five months of the license term. Specifically, the licensee used general recruitment sources which were unproductive and failed to add minority-oriented sources until the end of the license term. In fact, the licensee primarily relied on only one recruitment source until the end of the term -- a general broadcasting publication which produced one minority referral. In addition, the licensee interviewed more than one applicant for only six of its 27 hires during the term and interviewed only one minority applicant, who it eventually hired. Further, the licensee's recordkeeping was "sporadic, at best." It failed to keep records of the number, race or gender of interviewees in the six instances where more than one applicant was interviewed, thus further hampering any self-assessment efforts.

III. PLEADINGS

3. In support of its request for elimination or reduction of the forfeiture, Dolcom makes several arguments. First, it argues that it did not "systematically" exclude minorities from its recruitment process and staff as the Commission implied in *WTHZ-FM*. Second, it argues that the Commission's decision was discriminatory against Hispanics because its analysis emphasized recruitment of Blacks, who comprise 25.7% of the labor force in the licensee's area, over recruitment of Hispanics, who comprise 1.2% of the labor force.

4. Third, Dolcom argues that the Commission erred in comparing its EEO efforts with those of Stations WSBY(AM)/WQHQ-FM in Salisbury, Maryland. *See Woolfson Broadcasting Corporation of Salisbury/Ocean City, Inc.*, 4 FCC Rcd 6160 (1989) (*Woolfson*). It notes that the licensee of WSBY(AM)/WQHQ-FM employed a larger staff (an average of 25 as compared to an average of 13 for WUMX(FM)) and had more hiring opportunities (33 compared to 27 for WUMX(FM)). Further, it asserts that it hired an Hispanic whereas WSBY(AM)/WQHQ-FM did not hire any minorities during the term. In addition, Dolcom asserts that the Commission did not acknowledge that WUMX(FM) is a Class A stand-alone FM station competing with more powerful stations in the Tallahassee market. In contrast, the licensee notes that WQHQ-FM operates with power of 50 kw and was a leading station in its market at the time of the decision in *Woolfson*. Finally, it argues that the forfeiture amount as determined by the Commission ignores the fact that the licensee of WSBY(AM)/WQHQ-FM owned AM-FM combinations in several metropolitan areas and, therefore, had "deeper pockets" than WUMX(FM). In view of the above, Dolcom argues that the Commission erred in determining that its EEO record was more egregious than that of Stations WSBY(AM)/WQHQ-FM, which received a forfeiture in the amount of $15,000.

IV. DISCUSSION

5. Once a Notice of Apparent Liability for Forfeiture has been issued, the "respondent will be afforded a reasonable period of time (usually 30 days from the date of the notice) to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture." 47 U.S.C. Section 1.80(f)(3). Any showing by the respondent to support its request must include "a detailed factual statement and such documentation and affidavits as may be pertinent." *Id.* The factors that the Commission takes into account when determining the amount of a forfeiture penalty include "the nature, circumstances, extent and gravity of the violations and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 C.F.R. Section 1.80(b)(4).

6. After consideration of all the factors for determining the amount of a forfeiture and taking into account Dolcom's arguments, as addressed below, we find no basis upon which to reduce or eliminate the $18,000 forfeiture. Accordingly, we deny Dolcom's request and impose the forfeiture, as proposed, in the amount of $18,000.

[1] The licensee does not challenge the short-term renewal or the imposition of reporting conditions.

7. Although the licensee states otherwise, we observed in our earlier ruling that there was no evidence that the licensee engaged in discrimination. *WTHZ-FM* at 7695. However, our EEO Rule not only prohibits discrimination, but also requires broadcast licensees to engage in positive continuing efforts to recruit, hire and promote qualified minorities and women. *See* 47 C.F.R. Section 73.2080(b). In our earlier ruling, we imposed a Notice of Apparent Liability based on the licensee's inadequate EEO efforts, *i.e.*, its failure to recruit, hire and promote minorities.

8. We find that the licensee's arguments that the Commission failed to consider its EEO efforts toward minorities is without merit. As our ruling in *WTHZ-FM* indicates, we noted that the licensee hired an Hispanic for an upper-level position in our analysis of overall minority employment at the station. However, as we have consistently stated, we focus primarily on a licensee's efforts toward the dominant minority group in the labor force and non-dominant groups that are present in significant numbers.[2] Thus, although the licensee did attract a minority, its efforts toward Blacks, the dominant minority, were inadequate in light of its poor record-keeping, recruitment and self-assessment, and these inadequate efforts form the basis for the forfeiture.

9. We also find the licensee's argument that its EEO violations are less egregious than those of Stations WSBY(AM)/WQHQ-FM to be without merit. The licensee of WSBY(AM)/WQHQ-FM contacted a minority recruitment source for 14 positions, *see Woolfson* at 6160, whereas the licensee of WUMX(FM) relied unsuccessfully on one general source for all openings until the last five months of the term. In addition, WUMX(FM) is located in an area where Blacks comprise a higher percentage of the labor force than the percentage of Blacks in the labor force where WSBY(AM)/WQHQ-FM[3] is located. Therefore, WUMX(FM) has a larger minority labor force from which to recruit. Moreover, the licensee of WUMX(FM) owned its station longer than the licensee of WSBY(AM)/WQHQ-FM and had more time in which to implement an EEO program. Accordingly, the violations by the licensee of WUMX(FM) are more egregious than those of WSBY(AM)/WQHQ-FM. These findings in our original Order have not been challenged by WUMX(FM) on reconsideration.

10. Lastly, we find no merit to Dolcom's argument that the forfeiture should be eliminated or reduced because it owns a Class A stand-alone FM station while the licensee of WSBY(AM)/WQHQ-FM owned other stations. Our EEO Rule applies to all broadcast licensees regardless of the number of stations owned. *See* 47 C.F.R. Section 73.2080(a) and (b). Thus, the fact that Dolcom operates a Class A stand-alone FM station is, by itself, irrelevant to the issues of compliance with our EEO Rule and the amount of a forfeiture imposed for EEO violations.

V. CONCLUSION

11. After taking into account the licensee's arguments and those factors used to determine the amount of a forfeiture penalty, we find that our Notice of Apparent Liability imposing a forfeiture in the amount of $18,000 was appropriate. Accordingly, we deny Dolcom's request and issue a Notice of Forfeiture in the amount of $18,000.

VI. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED that the Request for Elimination Or Reduction of the Forfeiture filed by Dolcom Broadcasting, Inc. IS DENIED, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), that Dolcom Broadcasting, Inc. FORFEIT to the United States the sum of eighteen thousand dollars ($18,000) for the wilful and repeated violation of Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Notice of Forfeiture.

13. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Notice of Forfeiture to all parties.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[2] *See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 625 n.7 (D.C. Cir. 1978); *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893, 4894, 4900 n.9 (1990); *Letter to Mr. Pegram Harrison Re: Applications for Renewal of License of Stations WBBE(AM)/WMGB-FM, Georgetown, KY.*, 4 FCC Rcd 8255, 8256 (1989); *Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685, 6688 n.5 (1989); *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930, 1934 n.9 (1988); *Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944, 6949 n.14 (1988); *Application of Catawba Valley Broadcasting Company, Inc.*, 3 FCC Rcd 1913, 1917 n.11 (1988); *License Renewal Applications of Certain Broadcast Stations Serving the Chicago Metropolitan Area*, 89 FCC 2d 1031, 1034 (1982); *Application of KRMD, Inc. For Renewal of License of Station KRMD(FM), Shreveport, La.*, 53 FCC 2d 1179, 1187 (1975).

[3] The labor force for WUMX(FM), Tallahassee, is 25.7% Black while the labor force for WSBY(AM)/WQHQ-FM, Wicomico County, Maryland, is 19.1% Black.

Concurring Statement of Commissioner James H. Quello

In the Matter of License Renewal Application of Dolcom Broadcasting, Inc. For Station WUMX(FM), Tallahassee, Florida.

I concur in the Commission's decision because of the licensee's generally poor recruitment record regarding minorities. However, one argument raised by the licensee as a reason to mitigate the penalty — and the Commission's response — is troubling.

The licensee, which hired a Hispanic for an upper-level position during the license term, asserted that the Commission discriminates between minorities by failing to give the station credit for this hire. In response, the Commission acknowledged that "we focus primarily on a licensee's efforts toward the dominant minority group in the labor force." *Notice of Forfeiture* at ¶ 8.

This comes dangerously close to suggesting that stations can run afoul of our EEO policies for hiring the "wrong" minority — a notion that I find to be disturbing and counterproductive. This agency has no business deciding what may be an "approved" versus a "disapproved" minority when applying our employment policies.

An excessive concern with "dominant" or "nondominant" minority status is inconsistent with our minority ownership and employment policies. Although the Commission cites *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 625 n.7 (D.C. Cir. 1978) as the source of this analysis, the court in that case noted that the use of such statistics "has not properly been raised by the parties to this appeal." In discussing the issue, however, the court made clear that "the most relevant figure is usually the overall percentage of minorities in the workforce." *Id.* The court also emphasized that "the FCC has [not] limited 'the coverage of its antidiscrimination rules to groups dominant in the licensee's service area' . . . or that a station is free to discriminate against one minority group *so long as it practices countervailing discrimination in favor of another*. *Id.* (citation omitted, emphasis added).

In *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990), the Supreme Court explained that the rationale underlying the Commission's minority policies was to promote diversity in programming. That is, EEO and ownership policies seek to "ensure that . . . licensees' programming fairly reflects the tastes and viewpoints of minority groups." *Id.* at 3018, quoting *NAACP v. FPC*, 425 U.S. 662, 670 n.7 (1976). The Court said that it was "under no illusion that members of a particular minority group share some cohesive, collective viewpoint," but that it was a "legitimate inference" that with increased minority ownership and employment, "varying perspectives will be more fairly represented on the airwaves." 110 S. Ct. at 3018.

The Supreme Court emphasized that these policies exist not as a means to favor a particular group, but to serve the broader public interest. It noted that "[t]he benefits of such diversity are not limited to the members of the minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather, the benefits redound to all members of the viewing and listening audience." *Id.* at 3011.

Bottom line, our rules require all licensees to have an active EEO program, to assess its effectiveness and to make changes when necessary. But if "diversity" and "varying perspectives" are what we seek, we will find these goals to be elusive to the extent we attempt to determine which particular minority in a community is most acceptable in our employment policy decisions.

Fortunately, the *Notice of Forfeiture* notes that the licensee's EEO efforts "were inadequate in light of its poor record-keeping, recruitment and self-assessment, *and these inadequate efforts form the basis for the forfeiture*." ¶ 8 (emphasis added). I agree that the licensee's efforts were inadequate here, and therefore support the outcome in this case. But any suggestion that hiring the "wrong" minority is evidence of an inadequate EEO program is unacceptable.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 27, 1992

FEDERATION OF AMERICAN HEALTH SYSTEMS FILES PETITION FOR DECLARATORY RULING, OR IN THE ALTERNATIVE, PETITION FOR WAIVER, REGARDING CLASSIFICATION AS "CALL AGGREGATORS"

The Federation of American Health Systems ("F.A.H.S.") has filed a Petition for Declaratory Ruling, or in the Alternative, Petition for Waiver, with respect to the Commission's determination in CC Docket No. 90-313 that investor-owned hospitals and other health care facilities are "call aggregators" as defined in Section 226(a)(2) of the Communications Act. F.A.H.S. asks the Commission to declare that investor-owned hospitals and other health care facilities are not call aggregators with respect to patient bedside telephones. Alternatively, F.A.H.S. requests a waiver of the unblocking requirements contained in Section 64.704(c)(5) of the Commission's rules for investor-owned hospitals and other health care facilities with a small monthly volume of interstate telephone calls.

In the Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. § 226 ("TOCSIA"), an aggregator is defined as "any person that, in the ordinary course of operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2). The Commission in its *Report and Order* in CC Docket No. 90-313, 6 FCC Rcd 2744 (1991), adopted the TOCSIA definition *verbatim* and concluded that hospitals are "clearly within the scope of the definition of 'aggregator.'" 6 FCC Rcd at 2752. F.A.H.S requests a declaratory ruling that, notwithstanding this ruling, hospitals and other health care facilities are not aggregators with respect to patient bedside telephones.

The Commission invites comments on the petition. In particular, parties should address specifically financial difficulties and other hardships in complying with the unblocking requirements set forth in Section 64.704(c)(5). Relevant factors that commenters should address include the type of equipment currently in use, estimated costs to modify or replace equipment to comply with the unblocking requirements, the size of the institution, and the characteristics of the community in which the institution is located, such as rural or urban. Information on the revenues recovered by hospitals and health care facilities from their telephone systems and whether the level of such revenues should affect their unblocking obligations is also relevant. Finally, we seek comment on how callers in patient rooms will be ensured access to their carrier of choice and informed of their rights, if the petition is granted.

Parties wishing to comment on this matter may do so not later than September 24, 1992. Reply comments should be filed by October 12, 1992. All filings concerning this matter should refer to File No. ENF-92-08. Courtesy copies of any comments and reply comments should be provided to David Meyers, Federal Communications Commission, 1250-23rd Street, N.W., Plaza Level, Washington, D.C. 20554 (Stop Code 1600A1). A copy of the petition for declaratory ruling and any subsequently filed documents in this matter may be obtained from the Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036 (202) 452-1422. The petition and documents are also available for inspection and copying in the Public Reference Room, Plaza Level, 1250-23rd Street, N.W., Washington, D.C. 20554. For further information, contact David Meyers at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-28

In the Matter of

Amendment of Section 2.106 the Commission's Rules to Allocate the 1610-1626.5 MHz and the 2483.5-2500 MHz Bands for Use by the Mobile-Satellite Service, Including Non-geostationary Satellites	RM-7771 PP-29 PP-32 RM-7773 PP-30 PP-33 RM-7805 PP-31 RM-7806

ORDER

Adopted: July 23, 1992; Released: July 24, 1992

By the Chief Engineer:

1. In this *Order*, we deny the motion for stay of this proceeding filed by TRW Inc. (TRW) on April 6, 1992.

2. TRW requests that this proceeding be stayed pending Commission consideration of its petition for further reconsideration of the pioneer's preference rules, which it also filed April 6, 1992. TRW has not met the applicable standards for a stay, however. *See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). In particular, TRW has not shown that any tentative grant of a pioneer's preference to an entity other than it would cause it irreparable injury. Any such tentative grant might never be finalized, and a license to that entity might never be issued. Moreover, even if it were, TRW itself might still be granted a license. In any event, to the extent TRW is injured, it can preserve its rights and the Commission or a court can redress any injury. Finally, we note that the public interest would not be served by a stay here, as such action would delay the development and introduction of service to the public.

3. Accordingly, IT IS ORDERED THAT, the Motion for Stay filed by TRW Inc. on April 6, 1992, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Contract Tariff F.C.C. No. 21

Contract Tariff Transmittal No. 50

ORDER

Adopted: August 28, 1992; Released: August 28, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 17, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective August 31, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 21 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, Accunet Bandwidth Management Service, International Accunet Digital Service, and Local Channel services.

2. On August 24, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 50.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 21, Contract Tariff Transmittal No. 50 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 21, Contract Tariff Transmittal No. 50, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-552

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Provide
for the Use of the 220-222 MHz
Band by the Private Land Mobile
Radio Services

ERRATUM

Released: August 28, 1992

By the Chief, Private Radio Bureau:

1. On July 16, 1992, the Commission released a *Memorandum Opinion and Order*, FCC 92-261, in the above-captioned proceeding.[1] This document corrects and clarifies rule changes adopted in the *Memorandum Opinion and Order* that were not consistent with the clear intention of the Commission expressed in the text.

2. Paragraph (a)(4) of Section 90.713 is now amended and reads as follows:

> "(a)(4) Applicants for commercial nationwide channels must include an itemized estimate of the cost of constructing 40 percent of the system and operating the system during the first four years of the license term. Applicants for noncommercial nationwide channels must include an itemized estimate of the cost of constructing the entire system within five years and operating the system during the first five years of the license term."

3. Paragraph (a)(5) of Section 90.713 is now amended and reads as follows:

> "(a)(5) Applicants for commercial nationwide channels must include proof that the applicant has sufficient financial resources to construct 40 percent of the system and operate the proposed system for the first four years of the license term; i.e., that the applicant has net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs. Applicants for noncommercial nationwide channels must include proof that the applicant has sufficient financial resources to construct the entire system within five years of the license grant and operate the proposed system for the first five years of the license term; i.e., that the applicant has net current assets to cover estimated costs or a firm financial commitment sufficient to cover estimated costs.

4. Paragraph (b) of Section 90.713 now reads as follows:

> "(b) Applicants for commercial and non-commercial nationwide licensing relying on personal or internal resources for the showing required in paragraph (a) of this section must submit independently audited financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated construction and operating costs. Applicants for both commercial and noncommercial nationwide licensing must also submit an unaudited balance sheet, current within 60 days of the date of submission, that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed system, and a certification by the applicant or an officer of the applicant organization attesting to the validity of the balance sheet."

5. Paragraph (c)(3) of Section 90.713 is now amended and reads as follows:

> "(c)(3) Is willing, if the applicant is seeking a commercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of 40% of the system and operation of the system for the first four years of the license term; and"

6. A new paragraph (c)(4) is added to Section 90.713 and reads as follows:

> "(c)(4) Is willing, if the applicant is seeking a noncommercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of a minimum of at least one base station in at least 70 different geographic areas designated in the application within five years of receiving a license, and operation of the system for the first five years of the license term."

7. Because each of these rule changes correct errors, omissions, or inconsistencies and because these rule changes are required to clarify existing rules as they apply to applicants and prospective licensees of 220-220 MHz systems, IT IS FURTHER ORDERED that for good cause shown pursuant to the provisions of 5 U.S.C. § 553(d)(3) these rule changes are effective immediately upon publication in the Federal Register.

[1] The official text of the rule changes adopted in this item appears in 57 Fed. Reg. 32488 (1992).

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

47 C.F.R. Part 90 is amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 332, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303, and 332, unless otherwise noted.

2. 47 C.F.R. § 90.713 is amended by revising paragraphs (a)(4), (a)(5), (b), and (c)(3), and by adding a new paragraph (c)(4) to read as follows:

§ 90.713 Entry criteria.

(a) * * *

(4) Applicants for commercial nationwide channels must include an itemized estimate of the cost of constructing 40 percent of the system and operating the system during the first four years of the license term. Applicants for noncommercial nationwide channels must include an itemized estimate of the cost of constructing the entire system within five years and operating the system during the first five years of the license term.

(5) Applicants for commercial nationwide channels must include proof that the applicant has sufficient financial resources to construct 40 percent of the system and operate the proposed system for the first four years of the license term; i.e., that the applicant has net current assets sufficient to cover estimated costs or a firm financial commitment sufficient to cover estimated costs. Applicants for non-commercial nationwide channels must include proof that the applicant has sufficient financial resources to construct the entire system within five years of the license grant and operate the proposed system for the first five years of the license term: i.e., that the applicant has net current assets to cover estimated costs.

(b) Applicants for commercial and non-commercial nationwide licensing relying on personal or internal resources for the showing required in paragraph (a) of this section must submit independently audited financial statements certified within one year of the date of the application showing net current assets sufficient to meet estimated construction and operating costs. Applicants for both commercial and non-commercial nationwide licensing must also submit an unaudited balance sheet, current within 60 days of the date of submission, that clearly shows the continued availability of sufficient net current assets to construct and operate the proposed system, and a certification by the applicant or an officer of the applicant organization attesting to the validity of the balance sheet.

(c) * * *

(3) Is willing, if the applicant is seeking a commercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of 40 percent of the system and operation of the system for the first four years of the license term; and

(4) Is willing, if the applicant is seeking a non-commercial nationwide license, to provide a sum to the applicant sufficient to cover the realistic and prudent estimated costs of construction of a minimum of at least one base station in at least 70 different geographic areas designated in the application within five years of receiving a license, and operation of the system for the first five years of the license term.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

TELEPORT COMMUNICATIONS - NEW YORK — File No. 13135-CF-TC-(3)-92

For Transfer of Control of Stations WLU372, WLW316 and WLW317 from Merrill Lynch Group, Inc. to Cox Teleport, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: August 5, 1992; Released: September 4, 1992

By the Commission:

BACKGROUND

1. Teleport Communications - New York (Teleport) has filed the captioned application to transfer control of three common carrier point-to-point microwave radio stations from Merrill Lynch Group (Merrill Lynch) to Cox Teleport, Inc. (Cox). Teleport is a non-dominant common carrier certificated by the New York Public Service Commission (NYPSC) to provide telecommunications services throughout the state; one of the areas in which it currently provides service is Staten Island. At the present time, Merrill Lynch owns an 87.5% interest in Teleport Communications Group (TCG), the parent of Teleport. Cox presently owns a 12.5% interest, and has exercised an option to buy another 37.6% interest; transfer would provide Cox with a controlling 50.1% interest in TCG.[1] Cox has many other communications interests, including a 50% ownership interest in Staten Island Cable, a cable television system. This controlling ownership in a video programming distributor, coupled with Cox's proposed control of a common carrier which provides certain telecommunications services in the same geographic area, has raised the issue of whether the cable - telephone company cross-ownership prohibition of 47 U.S.C. §613(b)(1) bars the acquisition.

2. United States Telephone Association (USTA) has petitioned to deny the captioned application. Formal and informal responsive pleadings and comments have been filed by Teleport, Cox, USTA, National Telecommunications Information Agency (NTIA), Metropolitan Fiber Systems, Inc. (MFS)[2] and the Communications Workers of America (CWA). In this order, we deny the USTA petition.

PLEADINGS

3. USTA argues that Teleport, if controlled by Cox, will be a common carrier subject to Title II of the Communications Act due to the fact that it will provide video programming service within the same area in which it provides telephone service.[3] USTA argues that "as long as the Cable Act proscribes telephone company - cable cross-ownership, the proposed acquisition of Teleport by Cox... presents a fundamental issue of competitive fairness." Petition at 2. USTA acknowledges that the Commission has narrowly construed the cross-ownership prohibition to apply only to traditional local exchange carriers (LECs) in their state-certificated areas because of their control over bottleneck facilities needed by cable companies to bring programming to customers. However, USTA argues that this construction should be expanded to the literal language of the Cable Act, *see* note 3, *supra*, to reach Teleport's proposed arrangement. By continuing the present construction of the Cable Act, argues USTA, the Commission places its LEC members in an unfair competitive situation, because cable operators are not barred from offering telecommunications services. USTA argues that "[s]uch discrimination, if allowed to persist, would permit the cable operators, such as Cox, to sell into the telecommunications market from a competition-free sanctuary." Petition at 3-4.

4. USTA argues that Teleport, if controlled by Cox, would meet the two-part test of the Cable Act's ban: 1) Teleport is a common carrier subject in whole or in part to Title II, and 2) it has a telephone service area overlapping Cox's cable franchise area.

5. In support of its first point, USTA argues that "Teleport is undeniably a common carrier subject in whole or part to the Act." Petition at 7, citing orders of the New York Public Service Commission granting Teleport authority to operate as a "telephone corporation" authorized to provide "all forms of telephone service on an intracity basis throughout the State of New York." (Petition at 8, citing Teleport's application, Exhibit 10.)

6. In support of its second point, USTA argues that Teleport has a telephone service area because it is authorized to provide switched voice service by the State of New York and it offers such "local exchange switched telephone service" under NYPSC tariff. Because the State of New York has characterized Teleport's authorization as "local telephone service," USTA argues, the Commission must defer to New York's characterization. USTA argues that Congress intended that the term "telephone service area" should be defined by the states, not by the Commission, and that the Supreme Court's decision in *Louisiana PSC v. FCC*, 476 U.S. 355, 377 (1986) clarifies that the

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[1] A subsidiary of Tele-Communications, Inc., will purchase the remaining 49.9% interest in TCG.

[2] MFS requests the Commission use this transfer application to rule on the application of the cross-ownership rules to all competitive access providers.

[3] Section 613(b)(1) of the Cable Act of 1984 (47 U.S.C. §533(b)(1)) states:

> It shall be unlawful for any common carrier, subject in whole or in part to title II of this Act, to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.

authority to delineate telephone service areas rests in the states, not the FCC, under Section 2(b) of the Communications Act.

7. USTA also argues that tying application of the telephone company - cable cross-ownership restriction to control of "bottleneck" facilities is not practical because first, half its LEC members do not own bottleneck facilities and second, when Congress established the Cable Act, it had already assured cable operators of equal access to utility poles and conduits by passage of the Pole Attachment Act, 47 U.S.C. §224.[4] Accordingly, USTA argues, Congress cannot be deemed to have intended that only LECs with control over bottleneck facilities be barred from cable ownership.

8. The CWA filed comments in support of USTA, arguing that allowing Cox to control Staten Island Cable and provide local telephone service in the same area raises a fundamental issue of competitive fairness. CWA states that it supports lifting the statutory restrictions prohibiting LECs from providing cable TV services, because cable TV companies offer services provided by LECs.

9. Teleport argues in opposition that the Commission, courts, and Congress have all stated explicitly that the telephone company - cable cross-ownership prohibition applies only to local exchange telephone companies with monopoly control of telephone poles and conduits which nonaffiliated cable companies require to provide their services. Teleport argues that its services are provided by fiber optic transmission facilities, and that it must lease space on LEC poles and conduits -- it does not possess monopoly control of any telephone poles or conduits.[5] Teleport argues that it does not have a telephone service area within the meaning of Section 613(b) because the Commission has defined "telephone service area" as "local exchange service area," which, for Section 613(b) purposes, is a "telephone exchange service" area as defined in Section 3(r) of the Communications Act, 47 U.S.C. §153(r), *Telephone Company-Cable Television Cross-Ownership Rules*, 7 FCC Rcd 300 (1991).

10. Teleport further argues that the Commission has defined "telephone exchange service" as "the provision of two way voice communications between individuals by means of a central switching complex which interconnects all subscribers within a geographic area." *Domestic Public Radio Service*, 76 FCC 2d 273, 281 (1980); *see General Telephone Co. of Cal. v. FCC*, 413 F.2d 390, 401 n.19, *cert. denied*, 396 U.S. 888 (1969) ("CATV channel distribution service does not contemplate furnishing subscribers with 'intercommunicating service' of the type usually identified with a telephone exchange."). (Opposition at 18).

11. Cox argues that Section 621(d) of the Cable Act conflicts with USTA's reading of Section 613(b). Section 621(d) describes the authority of states with respect to regulating intrastate common carrier services provided by a cable television system, and authorizes states to impose tariff filing requirements for intrastate services that would otherwise be subject to Title II regulation, 47 U.S.C. §541(d). Cox argues that these provisions would be unnecessary if cable operators were not permitted to provide common carrier services. Since a statute must be construed to give effect to all its provisions, Cox argues, Section 613 cannot be interpreted as barring all cable common carriage service by affiliates of cable television systems; if this were so, there would be no purpose to Section 621(d) permitting states to require tariffs. Cox adds that the legislative history of the Cable Act makes clear that the Act was promulgated to codify existing Commission rules -- rules which prohibited LECs with monopoly control of bottleneck facilities from owning cable franchises.

12. NTIA argues that USTA's primary grievance is the telephone company-cable cross-ownership restriction, and that the Commission cannot cure the adverse effects of the restriction by extending it to Teleport. NTIA contends that the Commission has ruled that non-dominant carriers are not subject to the restriction. In addition, NTIA argues that the Commission has long defined "telephone service area" to mean "local exchange service area" -- an area in which a firm offers "telephone exchange service" as defined by Section 3(r) of the Communications Act.

DISCUSSION

13. Determining the sufficiency of a petition to deny is a two-step process. First, we must make a threshold inquiry as to whether the petitioner's properly supported factual allegations, if true, would be sufficient to support a finding that grant of the subject applications is not in the public interest. If the facts are such as to form the basis of an adverse public interest finding, *i.e.*, if a *prima facie* case has been presented, then the Commission must determine whether, based on all the materials in the record, a substantial and material question of fact is presented regarding whether the grant of the application would be in the public interest. 47 U.S.C. §309(d); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). While USTA's petition does make a *prima facie* case, after review of all the pleadings, we conclude that no substantial and material questions of fact exist. The issue before us is the interpretation of the facts under statutory law.

14. The issue with which we are presented is whether the telephone company-cable cross-ownership prohibition of Section 613(b)(1) in the Cable Act applies to Cox's proposed ownership of Teleport.[6] The facts show that Teleport is a non-dominant carrier which uses fiber optic lines to provide certain common carrier telephone services, but that it does not control bottleneck facilities.

15. While the language of the statutory prohibition applies to "any" common carrier, the Commission has consistently interpreted its pre-existing rules and the Section 613(b) cross-ownership prohibition to apply only to traditional local exchange carriers within their local exchange telephone service areas. FCC rules prohibiting cable - telephone company cross-ownership in effect at the time the Cable Act was passed were based on the judgement that cable television companies could be prevented

[4] Cox and Teleport point out that the Pole Attachment Act does not guarantee access to poles.

[5] Teleport states that it owns several miles of conduit in one Borough of New York City because LEC facilities were not available. Nevertheless, Teleport argues, it is not in a position to block any cable company from providing service.

[6] We find USTA has established standing to raise this issue. *See, e.g., U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 687 & n.14 (1974).

from fair access to poles and conduits they needed to bring service to consumers by telephone companies which had monopoly control of these bottleneck facilities. *See, e.g., Section 214 Certificates*, 21 F.C.C. 2d 307, 324 (1970), *aff'd sub nom. General Telephone Company of the Southwest v. U.S.*, 449 F.2d 846 (5th Cir. 1971).

16. Applying its traditional interpretation, the Commission has found a variety of common carriers, who are not among the traditional local exchange carriers having monopoly control over essential facilities in their local service areas, to be exempt from the statutory cross-ownership prohibition. For example, it has found the ban does not bar local exchange carriers from providing video programming service outside their local exchange service area. *Blanket Section 214 Authorization*, 98 F.C.C. 2d 354, 356 (1984). The Commission has also found that the cross-ownership prohibition does not bar non-wireline cellular telephone carriers from providing video programming service within their cellular telephone service areas. *Cable Act Implementation Order*, 55 Rad. Reg. 2d (P & F) 1, 16, and n.34 (1984), *aff'd on other grounds sub nom. ACLU v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); nor interexchange carriers, dominant or non-dominant, from providing video programming service within their telephone service areas, *Telephone Company Cable Television Cross-Ownership Rules*, 7 FCC Rcd 300, 322, 323 (1991), *appeal pending on other grounds sub nom. National Cable Television Association v. FCC*, D.C. Cir. No. 91-1649, filed September 26, 1991; *Twixtel Technologies, Inc.*, 5 FCC Rcd 4547 (Com. Car. Bur. 1990). The Commission has limited the ban to traditional landline local exchange telephone companies with monopoly control of bottleneck facilities.[7] Since Teleport has no such facilities in the franchise area of Staten Island Cable, we conclude that it is not a common carrier for purposes of the statutory ban.

17. Even assuming Teleport were a common carrier for purposes of the statutory ban, we conclude that it is not covered by the ban because it does not have a "telephone service area" within the area being served by Staten Island Cable. The Act bars prohibited affiliations only within the carrier's "telephone service area." The Cable Act did not define the term, and the Commission has held it refers to the "local exchange service area," *i.e.*, "service within a telephone exchange... operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 U.S.C. §153(r); *Telephone Company Cable Television Cross-Ownership Rules*, 7 FCC Rcd at 322-323. *See also Domestic Public Radio Service*, 76 F.C.C. 2d 273, 281 (1980). Teleport's system does not provide the ubiquitous, interconnected switched service that is characteristic of local exchange carriers. Unlike traditional local exchange carriers, Teleport does not have bottleneck facilities. Finally, Teleport is regulated as a non-dominant carrier by the Commission, while traditional local exchange carriers are regulated as dominant. We thus conclude that Teleport does not have a "telephone service area" as that term is used in Section 613(b)(1) of the Cable Act.[8]

18. USTA's arguments that the telephone-company - cable cross-ownership restriction is no longer necessary are well taken. This Commission favors repeal of the statutory cross-ownership restriction, and we are recommending to Congress that the prohibition be repealed, and that traditional local exchange carriers be permitted to provide video programming in their telephone service areas pursuant to safeguards.[9] Until and unless Congress acts to change the statute, we must continue to enforce the cross-ownership restriction. Expanding the prohibition, however, as USTA proposes, is insupportable. Such an action would be contrary to our consistent interpretation of the Cable Act, and the public interest.[10]

19. Accordingly, for the foregoing reasons, IT IS HEREBY ORDERED That the Petition to Deny filed by USTA is DENIED.[11]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[7] Congress has, of course, been aware of the Commission's construction of the meaning of Section 613(b) of the Act for many years. *See* Saxbe v. Bustos, 419 U.S. 65, 74 (1974).

[8] We reject USTA's argument that the states have authority to define terms contained in the Communications Act. Neither *Louisiana PSC* nor other authorities it cites supports USTA's proposition. It is for this Commission, not the states, to interpret terms contained in the Communications Act.

[9] *Telephone Company - Cable Television Cross-Ownership Rules*, FCC 92-327 (adopted July 16, 1992).

[10] We do not reach the issue of whether all competitive access providers in all circumstances are non-dominant or are covered by the statutory ban.

[11] We will act separately on the transfer of control application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Request for Ruling on
Advance Payment of
Political Advertising of
Beth Daly, Great
American Media, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 1992; Released: August 14, 1992

By the Commission: Commissioner Quello concurring and issuing a statement.

1. The Commission has before it an Application for Review and a Motion for Stay,[1] both filed on March 9, 1992, by Donrey Media Group, EBE Communications Limited Partnership, Fairbanks Communications, Inc., Heftel Broadcasting, Inc., Interep National Radio Sales, Inc., Meredith Corporation, Noble Broadcast Group, Inc., and Sterling Recreation Organization ("Petitioners"), seeking stay and review of a Mass Media Bureau ruling of February 6, 1992.[2] On April 10, 1992, the Petitioners filed a Request for "Call for Public Comment" ("Request").[3]

INTRODUCTION

2. Beth Daly requested advice on the extent to which broadcasters may require advance payment for advertising time purchased by political candidates. The Bureau issued a ruling setting forth its interpretation of the requirements of Section 312(a)(7) and Section 315 of the Communications Act: that a broadcaster generally may not require federal political candidates, or entities buying time on their behalf, to submit payment more than one week in advance of the air date of the first advertisement in the schedule.[4] The Bureau also concluded that:

> [I]f a candidate or a candidate's agency has an established credit history (and is responsible for payment), we believe that requiring any advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies.

3. Petitioners and Cox request that the Commission reverse *Beth Daly* with respect to the advancement of credit to candidates. The parties argue that the ruling *mandates* the extension of credit to political advertisers, whose campaign treasuries will "undoubtedly" be broke by the end of the election cycle, virtually assuring that stations will not be paid for political advertising.[5] The parties also variously argue that:

> *Beth Daly* is inconsistent with the long-recognized policy that it is reasonable for broadcasters to require payment in advance because of the nature of political campaigns, and thus should have been adopted only after notice and comment;[6]
>
> Regulation of credit and payment policies for political candidates is beyond the Commission's authority under Sections 315(b) and 312(a)(7) of the Communications Act;[7]
>
> *Beth Daly* creates discrimination between candidates by allowing broadcasters to extend credit to one candidate for an office but not to his or her opponents, and is thus contrary to Section 73.1940[8] of the Commission's rules;[9]

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[1] In light of the Commission's action herein on the Application for Review, the Petitioners' Motion for Stay is moot.

[2] *Beth Daly*, 7 FCC Rcd 1442 (MMB 1992). Also before the Commission is a Joint Statement in Support of Application for Review of the Petitioners ("Joint Statement") filed March 19, 1992, by Cox Enterprises, Inc. and Diversified Communications, Inc. ("Cox"). In addition, several parties filed letter comments, including Peter F. Szabo of Szabo Associates, Inc., Beth Daly of Great American Media, Inc., Mike Oatman of Great Empire Broadcasting, Inc., Dean Sorenson of Sorenson Broadcasting, and Terry E. Forcht of Key Broadcasting, Inc.

[3] In their Request, the Petitioners urge the Commission to seek public comment on *Beth Daly* and the related Application for Review. The Petitioners cite no Commission authority for the filing of this pleading or in support of their request. As discussed in greater detail herein, the decision in *Beth Daly* merely sets forth in writing an informal Commission policy that is well grounded in the Communications Act and the Commission's rules. For these reasons, no further action on Petitioners' Request is warranted.

[4] The Bureau also ruled that, in the absence of evidence of improper discrimination against, between, or among candidates, it will not intrude in the reasonable, good faith judgment of broadcasters in establishing methods for payment of political advertising. *Beth Daly*, 7 FCC Rcd at 1443. This aspect of the Commission's ruling was not challenged by Petitioners.

[5] Application for Review at 3-4. *See also* Joint Statement at 8-9; Letters of Sorenson, Oatman, Szabo, and Forcht.

[6] Application for Review at 10; Joint Statement at 2, 6-7. Cox asserts that the absence of a rule making in this case is particularly anomalous in light of the recent comprehensive rule making proceeding in which the Commission adopted new political broadcasting rules. Joint Statement at 2.

[7] Application for Review at 11-20; Joint Statement at 2-6. Petitioners and Cox also argue that the Bureau's reliance on *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1980), to support its proposition that Section 315(b) prohibits discrimination between political and commercial advertisers with respect to credit practices, is misplaced. Application for Review at 15-16; Joint Statement at 6.

[8] The Petitioners cite 73.1940(c) as the rule prohibiting discrimination between candidates. We note, however, that this rule was recently re-numbered to 73.1941(e).

[9] Application for Review at 9-11. *See also* Joint Statement at 7-8; Letter of Szabo. The Petitioners claim that *Beth Daly* may give incumbents an unfair advantage because, unlike their challengers, incumbents may have an advertising history with the station and will therefore be able to obtain credit. Application for Review at 11.

The credit system under *Beth Daly* could be abused by unscrupulous candidates who could, for example, order extensive amounts of air time without having to pay in advance;[10]

A candidate's employment of an advertising agency which has an established credit history with the station does not necessarily protect the broadcaster from nonpayment;[11]

The ruling does not adequately explain what is meant by an "established credit history";[12]

Requiring broadcasters to extend credit to federal candidates on terms more favorable than to similarly situated commercial advertisers constitutes a contribution in violation of the Federal Election Campaign Act ("FECA");[13]

Requiring broadcasters to extend credit to political candidates who may not pay for advertising puts broadcasters who forgive, settle, or write off a bad political debt at risk of making a prohibited contribution under the FECA and the FEC's rules;[14] and

It is not clear whether the *Beth Daly* ruling applies to state and local candidates.[15]

DISCUSSION

4. We find that the arguments of the parties challenging the Bureau's decision in *Beth Daly* are based in large part on misunderstandings and erroneous assumptions. The numerous adverse consequences envisioned -- extensive nonpayment of accounts by candidates and agencies, abuse of the credit system by unscrupulous candidates, and violations of the FECA and the FEC's rules -- should not occur as a result of this ruling. However, in view of the confusion generated by the ruling, we take this opportunity to expand and clarify the Bureau's interpretation.

5. *Beth Daly* requires a broadcaster to extend credit to a political advertiser *only* if the station would extend credit to a similarly situated commercial advertiser under the station's customary payment/credit policies. If a station's credit policies would, for example, require advance payment from a commercial entity that has been established only for a temporary time or purpose (*e.g.*, a seasonal fireworks merchant or a concert promoter),[16] has an uncertain credit history with the station (*e.g.*, a company that is new, advertising with the station for the first time, or advertises with the station only occasionally), or has an unstable financial condition, then the station can require advance payment from a political advertiser that falls within one or more of these categories. If, however, a station's policy is to extend credit to commercial advertisers no matter what their nature, credit history, or financial condition, then the station would be required to extend credit to political candidates. Likewise, a station can be required to extend credit to an advertising agency with respect to a candidate's account only if the agency has accepted legal responsibility for payment of that account and the agency qualifies for credit under the station's credit policies.[17]

6. As a practical matter, under these policies there may be only a limited number of instances in which a station will be required to extend credit to a candidate. Some political campaigns, for example, are not ongoing business concerns and thus may not qualify for credit under a station's customary credit requirements. Further, a candidate's agency is unlikely to accept legal responsibility for payment of a political account.[18] Finally, if a candidate or a candidate's agency does qualify under the station's credit policies, the likelihood that the station will receive payment will be comparable to the likelihood that the station will receive payment from a commercial advertiser that similarly qualifies under the station's credit policies.

7. The *Beth Daly* decision on credit comports with the nondiscrimination policies reflected in Section 315 of the Communications Act and Sections 73.1941(e)[19] and

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[10] Application for Review at 24; Letter of Szabo.

[11] Application for Review at 4. Petitioners argue that, if the advertising agency receives no payment from the candidate, it probably will not pay the station. A broadcaster with ongoing business dealings with that agency is unlikely to sue over collection of a political account, claim Petitioners. *Id.*

[12] Application for Review at 7, n.16; Joint Statement at 7-8. Petitioners argue that a general credit history is of little value because of the nature of a candidate's financial support. Petitioners also note that essentially all candidate time has been paid in advance until now, and thus no candidate will have an established credit history. Finally, Petitioners point out that an incumbent running for reelection will usually form a new election committee which is a different legal entity from his or her prior election committee. Application for Review at 7, n.16.

[13] Application for Review at 20-22; Joint Statement of Cox at 9, n.15. Petitioners explain that the FECA prohibits commercial vendors, including broadcasters, from treating candidates more favorably than similarly situated commercial advertisers. Such favoritism results in the credit becoming a contribution under the FECA and the rules of the Federal Election Commission ("FEC"). The contribution is automatically prohibited with respect to corporations, and limited with respect to unincorporated broadcasters. Application for Review at 20-21.

[14] Application for Review at 22-24; Joint Statement at 9, n.15.

[15] Application for Review at 17, n.30; Joint Statement at 4, n.6.

[16] Petitioners incorrectly imply that *Beth Daly* requires stations to extend credit to a candidate even if they would not extend credit to a seasonal fireworks merchant or a one-night concert promoter. Application for Review at 25.

[17] If, as Petitioners argue, a station is unwilling to sue an advertising agency over collection of a political account, this is a business decision of the station. We suspect that stations could, and do, decide not to sue for collection of commercial accounts for similar reasons.

[18] An incumbent may not have any advantage over his or her challengers in qualifying for credit if the campaign committee buying time on his or her behalf is a new legal entity. Moreover, most, if not all, campaign committees are temporary in nature, and thus may not qualify for credit for this reason.

[19] 47 C.F.R. Section 73.1941(e). This rule provides, in pertinent part:

> In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage....

73.1942(a)(1)(i)[20] of the Commission's rules.[21] These provisions prohibit discrimination between candidates, and between candidates and commercial advertisers, in station practices. The use of credit policies is a station practice that enhances the value of advertising spots in that, if credit is extended, an advertiser has the use of its money -- for example, to earn interest -- longer than an advertiser to which credit is not extended. Thus, a station must apply the same credit policies to candidates that it applies to commercial advertisers, and these policies must be applied without discriminating against or in favor of any particular candidate.

8. Petitioners and Cox believe that *Beth Daly* allows stations to impermissibly discriminate between candidates. This concern is unfounded. So long as a station's policies are not designed as a subterfuge to favor particular candidates and are applied even-handedly to all, impermissible discrimination does not occur. Applying the same credit policies to all candidates thus may result in credit being extended to some candidates but not to others. However, this outcome is not prohibited. In short, the decision in *Beth Daly* regarding the extension of credit to candidates violates no statutory policies and, moreover, is firmly grounded in our rules and in the nondiscrimination prohibition of Section 315(b).

9. Petitioners also question the policy articulated in *Beth Daly* that a federal candidate may not be required to pay for advertising more than seven days in advance of the air date of the first advertisement in the schedule. This policy flows directly from the "reasonable access" provision of Section 312(a)(7), which states:

> The Commission may revoke any station license or construction permit... for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

In the past, the Commission has ruled that broadcasters cannot adopt policies that impede a federal candidate's right of access under Section 312(a)(7). In *Barry Commoner and LaDonna Harris*, the Bureau determined that ABC, Inc.'s policy of requiring seventeen-days advance notice prior to placement of a political advertisement was unreasonable, pointing out that such a policy has the practical effect of "circumscribing substantially a federal candidate's access to the airwaves...."[22] Similarly, in the recent *Report and Order* on political programming policies, the Commission stated that stations must provide access to federal candidates the weekend before an election for purposes of arranging and providing programming if the station has so accommodated any commercial advertiser during the previous year.[23]

10. We believe that a one-week advance payment requirement strikes a careful balance between a federal candidate's right of access under Section 312(a)(7) and a broadcaster's need to ensure that payment will be received prior to the airing of political advertisements.[24] If a station were allowed to require payment from candidates more than one week in advance, this could affect the ability of federal candidates to purchase time from stations. As Beth Daly noted in her recent letter:

> Since political campaigns are frequently dependent on an ongoing stream of contributions (and, in the case of presidential campaigns, federal matching funds), the multi-week advance payment requirements by some stations put an unnecessary and unreasonable burden on our clients.

In contrast, we recognize that requiring less than one week advance payment may not provide stations with enough time to sell these spots to other advertisers should a candidate be unable to pay for a schedule.

11. We clarify that the one-week advance payment requirement applies, however, only to federal candidates, and only if the station's policy would require a federal candidate to pay *more* than seven days in advance. If a station has a policy requiring fewer than seven-days advance payment, this policy should be applied to candidates (federal, state, and local) in the same manner as it is applied to commercial advertisers. For example, a political advertiser should be required to pay no more than two days in advance if a broadcaster would require a similarly situated commercial advertiser to pay only two days in advance. As with the credit policy clarified above, this result comports with the nondiscrimination policies reflected in Section 315 of the Communications Act and Sections 73.1941(e) and 73.1942(a)(1)(i) of the Commission's rules.

12. As the above discussion demonstrates, the Bureau's decision in *Beth Daly* merely established in writing the informal Commission policy requiring no more than seven days advance payment for political advertising for federal candidates,[25] and clarified the circumstances under which

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[20] 47 C.F.R. Section 73.1942(a)(1)(i). This rule provides, in pertinent part:

> Any station practices offered to commercial advertisers that enhance the value of advertising spots must be disclosed and made available to candidates on equal terms. Such practices include but are not limited to any discount privileges that affect the value of advertising, such as bonus spots, time-sensitive make goods, preemption priorities, or any other factors that enhance the value of the announcement.

[21] The Section 73.1941(e) prohibition against discrimination between candidates derives from Section 315(a), which requires that legally qualified candidates for public office must be afforded equal opportunities to use a station's facilities. The Section 73.1942(a)(1)(i) prohibition against discrimination between candidates and commercial advertisers derives from the nondiscrimination policies reflected in Section 315(b). *See generally, Hernstadt v. FCC*, 677 F.2d at 905-907.

[22] 87 FCC 2d 399, 403 (MMB 1980).

[23] *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 683 (1991), *recon. denied*, 7 FCC Rcd 4611 (1992) (*"Political Programming Decision"*).

[24] The seven-day advance payment policy should not be interpreted by stations as prohibiting federal candidates from purchasing broadcast time less than one week in advance if such policy would abrogate their reasonable access or equal opportunities rights.

[25] *Beth Daly* does not, as alleged by Petitioners and Cox, repudiate a long established, "major" Commission policy. We note that the Petitioners cite no Commission rule, policy, or precedent that is in conflict with the ruling. Application for Review at 7-8.

this policy will be applied. With respect to advance payment and credit, the decision was merely an interpretative ruling based on the Communications Act and Commission rules adopted pursuant to the Act. Under these circumstances, the Commission was not required to institute a notice and comment rule making.[26]

13. Finally, Petitioners and Cox question whether the ruling in *Beth Daly*, which clearly applies to federal candidates, applies to state and local candidates.[27] The seven-day advance payment policy, which stems from the reasonable access provision of Section 312(a)(7), does not apply to state and local candidates, or to cable systems.[28] The credit policies set forth in the ruling, which stem from the nondiscrimination policies of Section 315 of the Act, apply to all candidates as well as to cable systems. [29]

14. Based on the foregoing, and pursuant to Section 1.115(g) of the Commission's rules, the Application for Review and Joint Statement ARE DENIED. The Bureau's ruling in *Beth Daly* is hereby AFFIRMED, and clarified as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[26] Section 553(b)(A) of the Administrative Procedure Act, which establishes those circumstances in which an agency must initiate a rule making, provides that:

> Except when notice or hearing is required by statute, this subsection does not apply... to interpretative rules, general statements of policy, or rule of agency organization, procedure, or practice....

5 U.S.C. Section 553(b)(A). *See also* 47 C.F.R. Section 1.412(b)(3) (interpretative rules will ordinarily be adopted without prior notice).

[27] Application for Review at 17, n.30; Joint Statement at 4, n.6.

[28] *See Political Programming Decision*, 7 FCC Rcd at 682.

[29] We note, however, that a station's advance payment and credit policies should not be interpreted so as to prohibit state and local candidates from purchasing broadcast time less than one week in advance where such policies would abrogate their equal opportunities rights.

Concurring Statement of Commissioner James H. Quello*

In re Request for Ruling on Advance Payment of Political Advertising of Beth Daly, Great American Media, Inc.

I concur in the Commission's decision because it may help bring some clarity to the often confusing area of political broadcasting law. The ruling that broadcasters can demand no more than a one-week advance payment adopts what has long been informal policy in this area. And hopefully, the explanation regarding when licensees must provide credit to political candidates will provide some guidance.

But I have some serious reservations about going along with this decision. It is important to note that the Communications Act does not require either compelled credit or limits on advance payment, as the *Memorandum Opinion and Order* suggests. While the statute gives the Commission the discretion to issue this ruling, I believe we will need to carefully monitor these policies to ensure that experience under them does not conflict with the letter and intent of the Act.

Credit Policies

In this decision, the Commission for the first time holds that our political broadcasting rules require broadcasters to offer credit to political candidates in certain circumstances. After summarizing nine objections raised by broadcasters to this new policy, the Commission dismisses the concerns as arising from "misunderstandings and erroneous assumptions." *Memorandum Opinion and Order* at ¶¶ 3-4.

Perhaps some confusion is understandable on this point, since the Bureau announced the new mandate with only the following explanation:

> [I]f a candidate or a candidate's agency has an established credit history (and is responsible for payment), we believe that requiring any advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies.1

In this *Memorandum Opinion and Order*, the Commission takes several pages to explain what we rather defensively suggest was clear from the Bureau letter. The explanation is fortunate, for it is the only reason that I can concur in the result.

Expanding on the Bureau's letter, the *Order* emphasizes that "most, if not all, campaign committees are temporary in nature, and . . . may not qualify for credit for this reason." Consequently, "[a]s a practical matter, under these policies there may be only a limited number of instances in which a station will be required to extend credit to a candidate" and "[s]ome political campaigns . . . are not ongoing business concerns and thus may not qualify for credit under a station's customary credit requirements."2 In other words, this new policy is unlikely to have any effect at all.

To the extent some licensees would be required to offer credit under this ruling, I tend to agree with the petitioners who suggest that this would undermine the Act's command that opposing candidates be treated equally. The *Order* acknowledges, for example, that candidates may be subjected to reasonable distinctions3 despite our rule that "no licensee shall make any discrimination between candidates."4

Such reasonable distinctions could involve denying credit to campaigns that are in "an unstable financial condition," have "an uncertain credit history" or that are "new, advertising with the station for the first time." *Memorandum Opinion and Order* at ¶ 5. Such differences are not unreasonable, according to the Commission; Section 315 requires "equal opportunities" to use broadcast facilities, but does not alter the fact that one candidate in a race may be able to afford more time than his or her opponents.

Despite the Commission's attempt to sound neutral, the new credit policy does more than simply recognize that some candidates will be better positioned than others to take advantage of the statutory guarantee of equal opportunities. The policy magnifies and institutionalizes the typical differences between candidates. In doing so, it places the Commission's thumb squarely on the side of the scale favoring incumbents and more well-heeled candidates.5 Those who are better off now can receive a benefit that can be denied to their less fortunate opponents — mandatory credit for broadcast advertising buys.

This result obtains even when a station applies its credit policies "even-handedly to all"

and is not seeking to favor a particular candidate. As the *Order* acknowledges, "[a]pplying the same credit policies to all candidates may result in credit being extended to some candidates but not to others." *Id.* at ¶ 8.

I simply cannot believe that this "rich get richer" approach is what Congress had in mind when it adopted the nondiscrimination requirements of the Communications Act. The *Memorandum Opinion and Order*, which seeks to ensure that broadcasters do not offer commercial advertisers more favorable credit terms than political buyers, actually approves significant discrimination between candidates. The Commission would be better off if it simply recognized that candidates — regardless of their particular financial circumstances — have more in common with each other than they do with commercial advertisers.[6]

These concerns would lead me to dissent if I believed that the credit policy would cause significant discrimination between candidates. But since the *Memorandum Opinion and Order* clarifies that virtually no station will be compelled to offer credit to candidates, I can concur.

Advance Payment

I do not agree with the Commission that the seven day advance payment policy "flows directly" from Section 312(a)(7) of the Communications Act. Nothing in the statutory text or legislative history even hints at a bar on stations asking for more than a one-week advance payment for political spots.

Indeed, the Commission's interpretation conflicts with the nondiscrimination requirement, since it limits advance payments for political time regardless of a station's policies regarding advance payments for commercial time. If a station requires more than seven days' advance payment for commercial advertisers, it nevertheless is obligated to apply preferential policies to candidates. Also, the advance payment policy articulated in this *Order* will permit significant discrimination between candidates, because it requires stations to adjust their prepayment policies to reflect those applied to "similarly situated commercial advertiser[s]."[7] This will allow the application of different prepayment periods to candidates in the same race, depending on their respective financial situations.

Nevertheless, I concur in the result for two reasons: the seven-day requirement is a bright line that is easily understood and the *Order* merely affirms a longstanding informal policy.

Conclusion

Our political broadcasting rules are sufficiently complex. We should avoid making them needlessly difficult. This is especially true where, as here, our policy pronouncements are unlikely to have any practical effect. If experience with these policies does not clear up the confusion, or if it reveals significant disparities between candidates resulting from neutral but discriminatory credit policies, I would favor immediate reconsideration.

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*This separate statement has been revised since the *Memorandum Opinion and Order* on this matter was released on August 14, 1992. Although the substance of the *Memorandum Opinion and Order* and this statement remain the same, the concurring statement released on August 14 was based on an earlier version of the *Order*. A final edited version of the *Memorandum Opinion and Order* was not circulated to this office prior to release. Some relevant changes are noted below.

[1]Letter from Milton O. Gross to Beth Daly (February 6, 1992).

[2]*Memorandum Opinion and Order* at ¶ 6 & n.18.

[3]The draft *Order* discussed at some length the ability of stations to make "reasonable distinctions between candidates" and noted that it is "implicit in Section 315(a) that candidates may be treated differently." Although much of this language was deleted, the final *Memorandum Opinion and Order* acknowledges that Commission policy prohibits only "*impermissible* discrimination," and notes that "[a]pplying the same credit policies to all candidates may result in credit being extended to some candidates but not to others." *Id.* at ¶ 8 (emphasis added).

[4]47 C.F.R. § 73.1941(e). *See* 47 U.S.C. § 315(a) (candidates are entitled to "equal opportunities" to use a station's facilities).

[5]The Commission may find it difficult to reconcile its assurances that "[a]n incumbent may not have an advantage over his or her challengers in qualifying for credit if the campaign committee

buying time on his or her behalf is a new legal entity" with its statement that only "[s]ome political campaigns . . . are not ongoing business concerns." *Compare Memorandum Opinion and Order* ¶ 6 with *id.* n.18.

[6]The Commission attempts to compare candidates to commercial entities that are established "only for a temporary time or purpose," such as a seasonal fireworks merchant. *Memorandum Opinion and Order* at ¶ 5. However, with respect to advertising credit and political campaigns, I am skeptical that there is such a thing as "a similarly situated commercial advertiser." *Id.*

[7]This language and analysis did not appear in the initial draft and was added to the edited version of the *Memorandum Opinion and Order* at ¶ 11.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

AAD 92-68 Released: September 2, 1992

UTAH-WYOMING TELECOM, KAMAS-WOODLAND TELEPHONE COMPANY AND ALL WEST COMMUNICATIONS, INC. PETITION FOR WAIVER OF THE COMMISSION'S RULES REGARDING STUDY AREA, PART 36, APPENDIX-GLOSSARY AND SECTIONS 36.125(f), 36.154(e)(1) AND (2)

Comment date: September 22, 1992
Reply date: October 6, 1992

On August 20, 1992, the Utah-Wyoming Telecom ("Telecom"), and Kamas-Woodland Telephone Company (Kamas-Woodland), and All West Communications (All West) jointly filed a petition for waiver regarding the definition of "study area" contained in the Appendix-Glossary of Part 36, and of allocation factor calculations in Sections 36.154(e)(1) and (2) of the Commission's rules to allow the consolidation of these three companies into a single study area (All West).

Parties may file comments on this petition no later than September 22, 1992. Replies should be filed by October 6, 1992. Comments should reference AAD 92-68. A copy of each pleading should be sent to Gary Oddi, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1990 M Street, N.W., Suite 640, Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from DCC.

For further information contact Gary Oddi at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 23 — Contract Tariff Transmittal No. 52

ORDER

Adopted: August 31, 1992; Released: August 31, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 18, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 1, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 23 for AT&T Accunet Spectrum of Sigital Services, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On August 25, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 52.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 23, Contract Tariff Transmittal No. 52 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 23, Contract Tariff Transmittal No. 52, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 22 — Contract Tariff Transmittal No. 51

ORDER

Adopted: August 31, 1992; Released: August 31, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 18, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 1, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 22 for AT&T Software Defined Network (SDN) Service.

2. On August 25, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 51.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 22, Contract Tariff Transmittal No. 51 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 22, Contract Tariff Transmittal No. 51, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 24 — Contract Tariff Transmittal No. 54

ORDER

Adopted: August 31, 1992; Released: August 31, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 20, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 3, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 24 for AT&T Software Defined Network (SDN) Service, Accunet Spectrum of Digital Services, Accunet T45 Service, Accunet T1.5 Service, Dataphone Digital Service, and Local Channel Services.

2. On August 27, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 54.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 24, Contract Tariff Transmittal No. 54 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 24, Contract Tariff Transmittal No. 54, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Contract Tariff F.C.C. No. 25

Contract Tariff Transmittal No. 55

ORDER

Adopted: September 1, 1992; Released: September 1, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On August 21, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective September 4, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 25 for AT&T Accunet Spectrum of Digital Services, Accunet T1.5 Service, and Local Channel Services.

2. On August 28, 1992 Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 55.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 25, Contract Tariff Transmittal No. 55 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 25, Contract Tariff Transmittal No. 55, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, 7 FCC Rcd 2677 (1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

David Berkman

against

Radio Station WISN(AM)
Milwaukee, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1992; Released: September 14, 1992

By the Commission: Commissioner Duggan issuing a separate statement.

1. The Commission has before it an Application for Review filed November 25, 1991, by the above-listed complainant, seeking review of a Mass Media Bureau ruling of November 7, 1991. *David Berkman*, 6 FCC Rcd 6640 (MMB 1991). That ruling denied a complaint against WISN(AM) under Section 73.1920 of the Commission's rules ("personal attack rule"), 47 C.F.R. 73.1920.

2. After careful review of the instant complaint, we believe that the Mass Media Bureau's ruling was correct, and the Application for Review does not contain sufficient grounds to warrant a reversal or alteration of the ruling. Therefore, pursuant to Section 1.115(g) of the Commission's rules, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

STATEMENT OF
COMMISSIONER ERVIN S. DUGGAN

In Re: Complaint of David Berkman Against Radio Station WISN(AM), Milwaukee, Wisconsin

The Commission attempts to give licensees and the citizens in their communities wide latitude for vigorous, even rough, political debate. Personal attacks broadcast in the course of that debate must rise to a severe level before we will intervene.

In this instance, however, I can readily understand why Professor Berkman believed he was treated unfairly. The comments made against him on the air were certainly open to the interpretation that Professor Berkman gave them — although, on balance, I will not dispute the reasonableness of the station's explanation. I do want to underscore, however, that, if WISN's management had given Professor Berkman an opportunity to respond, the station could have done a great deal to defuse this situation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ricardo Samitier — BNAL/Acct. No.: 215HF0018
Miami, Florida

NOTICE OF APPARENT LIABILITY

Adopted: September 4, 1992; Released: September 15, 1992

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Ricardo Samitier for willful violation of Section 301 of the Communications Act, 47 U.S.C. § 301.

2. The appropriate amount of forfeiture for these violations is $16,000.

II. BACKGROUND

3. On December 17, 1991, the Commission's Miami field office (FOB) became aware, through the local press, of allegations that Mr. Samitier was operating two unlicensed broadcast stations.

4. On December 18, 1991, the FOB went to a lake known locally as Blue Lagoon and found a raft Pemitting radio signals on 90.9 MHz and 91.9 MHz.[1] Between 2 and 3 PM EST, the engineers made field strength measurements; the results of which indicated that the operation was not exempted from the licensing requirement under Part 15 of the Commission's Rules—the field strength at approximately 1.5 kilometers away was 575 μV/m and at approximately 30 meters away was 3,450 μV/m. The Rules allow a maximum of 250 μV/m at 3 meters for operation without a license. *See* 47 C.F.R §§ 15.1(a) & 15.239(b). The point on the shore 30 meters from the raft was the closest the engineers could get to the raft at the time.

5. At approximately 4 PM EST on December 18, 1991, the FOB notified Mr. Samitier that the operation of the stations was in violation of the Communications Act. By 5:15 PM EST that day he had taken the stations off the air.

6. On December 19, 1991, the FOB inspected the stations. Each consisted of a home-built kit-type transmitter powered by a 12-volt storage battery. Mr. Samitier claimed to have reduced the power and requested that the engineers make another measurement. The engineers took the equipment on shore; the field strength of each transmitter was measured to be 3,450 μV/m at 3 meters.

III. DISCUSSION

7. Mr. Samitier has violated Section 301 of the Communications Act with each transmitter on each of two days.

8. The violations are willful.

9. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Record 4695 (1991), *modified in part on recon.*, FCC 92-212, 57 Fed. Reg. 24,986 (June 12, 1992), the base forfeiture amount for operation without an instrument of authorization for the service is $8,000 for each violation. No adjustments appear warranted. We consider the operation of each station, on a different frequency, to constitute a separate violation. Because there were two violations here, it is consistent with the *Policy Statement* that the forfeiture amount be $8,000 for each violation, or a total of $16,000.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Ricardo Samitier IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $16,000 for operating two unlicensed stations in violation of Section 301 of the Communications Act. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Ricardo Samitier shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No.: 215HF0018" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Mail Stop 1500E3
Room 744
1919 M Street, NW
Washington, D.C. 20054
NAL/Acct. No.: 215HF0018

[1] These frequencies are assigned to the FM Broadcast Service.

12. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Monetary Forfeiture shall be sent by Certified Mail to Ricardo Samitier, 12374 S.W. 25th Trail, Miami, Florida 33175.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-350

In re Applications of

ABACUS BROADCASTING CORP. File No. BRH-900530A2

For Renewal of License of Station
KJQN-FM, 95.5 MHz, Ogden, Utah

Appearances

Ann C. Farhat and *Gene Bechtel*,[1] and *Garrett W. Haston*, *pro se*, on behalf of Abacus Broadcasting Corp. and *Larry A. Miller* and *James W. Shook* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: September 1, 1992; Released: September 16, 1992

1. This case was designated for comparative hearing to consider two applications for Channel 238C at Ogden, Utah on November 25, 1991. *Hearing Designation Order*, 6 FCC Rcd 7182 (MMB 1991). Abacus seeks renewal of the application of KJQN-FM which currently operates on Channel 238C. The application for renewal was filed on May 30, 1990 by Utah Broadcasting Corp., although at the time the Commission had approved an assignment of the license from Utah Broadcasting to Abacus. After the sale was consummated, on October 5, 1990, the renewal application was amended to specify Abacus. *HDO*, 6 FCC Rcd, at 7182 n.1. The other applicant, Rees Broadcasting, Inc., dismissed its application on April 24, 1992. *Memorandum Opinion and Order*, FCC 92M-501, released April 28, 1992. The following issues remain to be determined in this decision:

1. To determine whether Abacus lacked candor with respect to its "Threshold Showing," filed January 9, 1992.

2. To determine whether Abacus abused the processes of the Commission with respect to its "Threshold Showing," filed January 9, 1992.

3. To determine, in light of the evidence on issues 1 and 2, whether Abacus is basically qualified to remain a Commission licensee and/or whether Abacus, pursuant to §1.80 should be assessed a forfeiture to the maximum amount permissible, for reasons given in the memorandum (FCC 92M-308, released March 11, 1992) and in consideration of §§1.17, and 73.4280.

4. To determine in light of the evidence adduced pursuant to the foregoing issues, whether Abacus Broadcasting Corp.'s application should be granted.

2. A prehearing conference was held on February 13, 1992. Tr. 1-20. Written testimony and exhibits were exchanged on May 8, 1992. Sessions to examine witnesses on their written testimony were held on May 18 (Tr. 21-245) and 19, 1992. Tr. 246-80. The record was closed on May 19, 1992. Tr. 280. *Order*, FCC 92M-609, released May 28, 1992. Proposed findings of fact and conclusions were ordered to be filed on June 30, 1992. At the request of Abacus, an extension was granted until July 10, 1992. *Memorandum Opinion and Order*, FCC 92M-724, released June 30, 1992. The Mass Media Bureau filed its proposed findings and conclusions on July 10, 1992. After ordering Abacus to show cause why its application should not be dismissed for failing to file its proposed findings when due, Abacus filed proposed findings on July 21, 1992, the date on which it was required to respond to the order to show cause. No replies were filed.

FINDINGS OF FACT

Whether Abacus was candid about its antenna site and coverage in its threshold showing.

3. On January 9, 1992, Abacus requested permission to show that its proposal would have greater area and population coverage than competing applicant Rees. Jt. Exh. 7. Abacus pointed out that while it currently operates from the same antenna site proposed by Rees, it held a construction permit which was granted to Utah Broadcasting on January 22, 1988 and assigned to Abacus on October 5, 1990 authorizing a new tower site "3.67 miles from Promitory [sic] Point, at 41^0 15' 27" N, 112^0 26' 24" W." *Id.*, at 2. Abacus represented that it would serve 1,194,327 persons, while Rees operating at Abacus' existing site would serve only 564,496 persons, a difference of 115 percent. *Id.*, at 2. The January 22, 1988 construction permit, which was attached to the threshold filing, expired on July 22, 1989. *Id.*, at 5. In addition, Abacus submitted technical data about its proposed antenna at Promontory Point (*id.*, at 6-8) and an engineering exhibit comparing the area and population coverage at Promontory Point with Rees' proposed coverage. *Id.*, at 10.

4. The Bureau pointed out in opposition to Abacus' request that all the evidence in the Commission's records indicated that Abacus did not have reasonable assurance for a transmitter site at Promontory Point. The Bureau explained that, on June 14, 1990, Utah Broadcasting requested an extension of time to construct its new tower and represented that the site designated in Abacus' threshold showing was no longer available. Bureau's Opposition to Threshold Showing, filed January 23, 1992; Jt. Exh. 3. The Bureau stated that the Commission extended the permit until January 23, 1991. Bureau Opposition to Threshold Showing, at Attach. 2.

5. The Bureau explained further that when that extension expired, Abacus requested, on January 22, 1991, an additional extension of the construction permit. Despite Utah Broadcasting's representation, in June 1990, that a new site had been found 0.3 km NNE of the originally designated site on land owned by Sam Chournos and that the new site would be specified within 45 days (Jt. Exh. 3, at 2), Garrett Haston, the President of Abacus, stated that

he had not selected a new site. Jt. Exh. 5; Abacus Exh. 1, at 1. Haston said that Abacus had begun engineering studies to determine the best location for the antenna site and that in the spring of 1991 he would visit Promontory Point to determine which one was best. *Id.* Haston also represented that Abacus had purchased a 25 kW transmitter for the upgrade, which would be delivered in March 1991. *Id.* That extension request was filed by Abacus' counsel, Dan Alpert, who also filed the threshold showing. Jt. Exh. 5, at 1. The Commission has not granted Abacus' January 1991 extension request. The Bureau pointed out that the Commission did not hear from Abacus about the site again until July 2, 1991, when Abacus responded to a Commission staff request about the status of Abacus' plans. Abacus then said that it had been negotiating with Utah Gas Co. for a site on Promontory Point but the parties were unable to agree on a rental fee. Jt. Exh. 6. Abacus claimed it was attempting to "acquire" an alternative site which would take 60 days. Jt. Exh. 6. This letter too was signed by Dan Alpert. *Id.*

6. Because Abacus made no mention in the threshold showing of its long history of representing to the Commission that it had not selected a site at Promontory Point, the Bureau argued that Abacus had withheld material facts which would have defeated its request. Bureau Opposition, at 2-3.

7. After the Bureau had raised this issue, on February 5, 1992, Abacus admitted it did not have assurance for the site it designated in the threshold showing but it would "shortly" file for a site 0.3 kilometer from the site which it had indicated. Jt. Exh. 8, at 2. Abacus claimed that the coordinates designated in the threshold showing were a mistake and it urged that the designation of a site it knew was unavailable without mentioning that fact "was purely inadvertent." *Id.* Abacus said that the reason it had not informed the Commission about another site was because the closing had not occurred on its purchase of KJQN-FM from Utah Broadcasting. *Id.*, at 4. Haston claimed that a new site on Promontory Point owned by Sam Chournos had been found in the summer of 1990 by Utah Broadcasting. *Id.*, at 11. According to Haston, when Abacus "took control" of KJQN-FM in October 1990, he intended to tell the Commission about the new site when the extension expired in January 1991. *Id.* However, Haston maintains that when the permit was about to expire in January 1991, he heard about the Utah Gas Co. site which was only 0.1 kilometer from the originally designated site. *Id.* Finally, Haston said he decided in the summer of 1991 to do nothing further about a new antenna site until the sale closing took place. In its February 1992 filing, Abacus represented that it had had reasonable assurance for a new site for 19 months, although it had not informed the Commission. *Id.*, at 5. Haston said at the hearing that his letter of January 14, 1991 to the Commission (Jt. Exh. 5, at 3) was intended to convey to the Commission his intention of locating the tower within 0.3 kilometer of the originally designated site. Tr. 183.

8. On February 13, 1992, Abacus conceded in responding to the Bureau's allegations that it had failed to disclose in the threshold showing that it had, on two occasions, represented to the Commission that it had not selected a site at Promontory Point. Jt. Exh. 9, at 1. It maintained again that the filing was an "unintentional mistake." Abacus stated that Abacus' principals "did not participate in drafting the [s]howing, nor did they review it prior to filing." *Id.* Abacus claimed it would use a site near to the one it represented in its threshold showing request and that that site would provide the same coverage Utah Broadcasting originally proposed. *Id.*, at 2.

9. When opposing this issue, Abacus related a different line of reasoning for its claim of a coverage preference from that made in the threshold showing. Abacus stated that because Utah Broadcasting proposed a new site for which it had reasonable assurance before KJQN's renewal was filed, it should be allowed to claim a coverage preference even though reasonable assurance was lost because it now had assurance of an essentially equal site. *Id.*, at 9.

10. Haston said, on February 12, 1992, that his counsel, Dan J. Alpert, told him that it would be advantageous to claim in the renewal proceeding that Abacus intended to locate its antenna on Promontory Point. *Id.*, at 37. Haston said he believed that the "ongoing plans" for Promontory Point entitled Abacus to "credit." *Id.*, at 38. Haston said he did not tell Alpert to omit facts and did not discuss with him the availability of the site used in the threshold showing. *Id.* Haston, at that time, characterized Abacus' efforts to locate at Promontory Point as one involving gradual steps. *Id.*, at 37. Abacus repeated its argument that because it would locate to an adjacent site with similar coverage, the representation made in the threshold showing was accurate in "basic respects" and contained "the decisionally important facts." *Id.*, at 12. Abacus also filed a declaration from Thomas V. Greenleigh, who was President of Utah Broadcasting Corp. Greenleigh claimed that he obtained "permission" to use the Sam Chournos property immediately adjacent to the site Abacus designated in its threshold showing in "approximately June 1990." *Id.*, at 23. Use of that site, referred to by Greenleigh as the Chournos site, was being negotiated when KJQN was sold. *Id.*, at 23.

Garrett Haston's testimony

11. Haston spoke with both his counsel, Dan Alpert, and the engineers who prepared the threshold showing in what he said were "last minute calls . . . on the eve of the filing deadline." *Id.* He represents that Alpert called him the day before the threshold showing was filed and consulted with him about which engineer to hire for the filing. Abacus Exh. 1, at 12. He told Alpert that he still intended to locate his antenna on Promontory Point. *Id.* But, he claims he "didn't focus" on the exact location for the tower. *Id.* Although, he said he knew that he was not going to use existing towers but "in [his] mind's eye" he thought he would use

> an elevated point 0.3 kilometers [sic] to the northeast of an existing radio tower that was a desirable location identified in the extension application which Abacus filed in January 1991 and which was a location which we had in mind when we spoke to Mr. Chournos in the Spring [sic] or early Summer [sic] of 1991 (and became detoured in negotiations to lease space on the Utah Gas Company tower). *Id.*, at 13.

12. Haston said he did not review the threshold showing for accuracy either before or after it was filed. *Id.*, at 13. He did not read it. Because of his "life style," he relies on attorneys to explain matters to him orally. *Id.* His spouse read his testimony to him. *Id.*, at 13-14. He maintains that "[i]t never occurred to [him] that there could be any

misleading information regarding [Abacus'] proposed coverage" in Abacus' filings. *Id.*, at 14. Haston characterized the inaccurate threshold showing as Alpert's mistake. *Id.*, at 13.

13. Haston claims he was not consulted about moving KJQN's transmitter by Greenleigh or Utah Broadcasting. Tr. 108. He does not know whether he heard about it at Utah Broadcasting's Board of Directors' meetings. Tr. 115. But, by the time he signed the asset purchase agreement, in December 1987, Haston knew about Utah Broadcasting's proposal to move KJQN's transmitter to Promontory Point. Tr. 125. He did not then know where on Promontory Point Utah Broadcasting proposed to locate. Tr. 126. Haston said he knew that Greenleigh had arranged to use a site owned by Sam Chournos. In November or December 1990, he believes, Bruce Earle called Chournos about the site. Tr. 151. In any event, Haston maintains no decision was made to use the Chournos site then and no actual engineering was done for the Chournos site until after the Bureau raised this issue. Tr. 187. Haston did not talk to Chournos about using his land until February or March 1992. Tr. 188. When first questioned about when Chournos was contacted, Haston said he called him in November or December 1990, and then he said he could not recall. Tr. 150. Haston also made a down payment on a transmitter in November or December 1990. Tr. 149. But Abacus never has taken delivery. Tr. 153. By January 8, 1992, Haston said he no longer had reservations about building the new antenna facility on Promontory Point because Abacus' liability in the bankruptcy proceeding involving KJQN-FM had been resolved. Abacus Exh. 1, at 12. (In December 1991, Haston said he and the trustee in the bankruptcy reached an agreement on how much more Abacus would pay for KJQN to resolve the claims against the station. That amount convinced Haston to close on the sale.)

14. When Abacus requested an extension of the construction permit on January 22, 1991, Haston said he thought he was notifying the Commission that Abacus would locate at a new site within 0.3 km of the site used in the threshold showing. Tr. 183. Although, he also said that no site had been selected at that time. Tr. 182. No engineering work was begun until after this issue was raised in February 1992. Tr. 187. In fact, while he said that the site had been arranged for in November or December 1990 (Tr. 186), Haston did not talk with Sam Chournos until February 1992. Tr. 188.

15. Haston graduated from the Harvard University Graduate School of Business Owner/President Management Program (1984-1989). Abacus Exh. 1, at 1. He also has taught graduate courses in communications. *Id.* He claims, however, that because of dyslexia it takes him a long time to read documents. *Id.* The threshold showing is four paragraphs long and covers a double spaced page and a half. Jt. Exh. 7.

Dan Alpert's testimony

16. The threshold showing was filed for Abacus by its counsel, Dan Alpert. Abacus Exh. 2. According to Alpert, on January 8, 1992, when Haston and Alpert discussed who would prepare the engineering and what would be included in the engineering showing, they did not discuss how the data for the engineering study would be derived. Abacus Exh. 2, at 6. Alpert represents that they did not discuss any specific site on Promontory Point and they did not discuss coordinates. *Id.* Alpert provided the engineering firm with the original engineering that had been submitted by Utah Broadcasting on December 1, 1983 for the Promontory Point site it designated. Abacus Exh. 2, at 7. The draft of the showing prepared by Alpert was reviewed by another lawyer in Alpert's firm, E. William Henry. *Id.*, at 8. Alpert knew that the site designated in the threshold showing was no longer available to Abacus because in January 1991 he filed a request to extend the construction time in order that Abacus might propose another site. *Id.* He did not review the engineering in the threshold showing before it was filed and, therefore, he did not notice that the showing had been prepared with an unavailable site. *Id.*, at 9. Alpert admits that Abacus was proposing a site which the Commission had been told was not available. Abacus Exh. 2, at 9.

17. Alpert maintains he never gave any thought to what the coordinates should be in the threshold showing. Abacus Exh. 2, at 9. He admits that he knew of no site for which he could assert correct coordinates. *Id.*, at 10. Nevertheless, Alpert claims that he believed the coordinates were accurate. *Id.* He asserts that he could have used the location known as the Chournos site which Abacus designated on March 27, 1992 because he had had conversations with Haston which he believed gave him that "authority." *Id.*, at 11. Alpert said he believes the site designated in March 1992 was the same from an engineering standpoint as the one indicated in January 1992 in the threshold showing. *Id.*, at 12. He sent the threshold showing to Haston after it was filed. *Id.*

18. Alpert is unable to establish that Abacus notified the Commission before January 9, 1991 that consummation of the transfer of KJQN-AM-FM took place on October 5, 1990. *Id.*, at 13. His office records reflect that he prepared it on October 9, 1990 but the Commission files and records show it was filed on January 9, 1991, after Alpert discovered there was no record of its having been filed. *Id.*, at 13-19.

19. Alpert claims that he did not inform the Commission that Abacus was delaying construction of the tower due to Utah Broadcasting's bankruptcy proceeding because he was not informed about that reason by Haston. *Id.*, at 14-15. Alpert claims he did not know about Haston's decision not to build because of Utah Broadcasting's bankruptcy until February 1992. *Id.*, at 15. Alpert believes that would have been another reason for granting the extension. *Id.*, at 15-16.

20. Alpert states that he did not know about the construction permit for the new tower site until January of 1991. Tr. 215. Because he did not know about the CP, he did not know what Utah Broadcasting or Abacus intended to do with the permit. *Id.* Alpert did not know, until January 1992, what reason Utah Broadcasting gave to the Commission on June 10, 1990 for extending the construction time. Tr. 217.

21. In January 1991, the reasons Abacus gave to the Commission for extending the time for construction were not anything that Alpert knew first hand or checked. Tr. 225-26. Alpert does not know whether Abacus undertook the steps to locate a new site after it represented that it would in January 1991. Tr. 227. In June 1991, Alpert filled out the legal portion of a Form 301 for a new site and sent it to Haston; he did this because the Commission requested that Abacus complete its modification of the outstanding CP. Tr. 228-29. Alpert prepared the July 2, 1991 request to the Commission for 60 more days to designate a new site. Tr. 231. That request represented that

Abacus was looking for an alternative site because the Utah Gas site could not be arranged. Joint Exh. 6. Alpert said the time needed came from Abacus' engineer. Tr. 231. During July 1991, Sam Chournos' site was not mentioned by Haston or the Abacus engineer to Alpert. Tr. 233.

22. Alpert had one conversation with Haston about whether Abacus intended to move to Promontory Point before the threshold showing was filed. Tr. 242. But he did not ask where. *Id.* He had not spoken to Sam Chournos and was not aware that Abacus was considering using the site owned by Chournos. Tr. 243.

23. Alpert maintains that he did not think about his July 1991 representation that Abacus was seeking a new site when he prepared the January 1992 threshold showing. Tr. 248-49. He also did not think about the extension he filed in January 1991 or the letter he sent Haston in June 1991 that dealt with the need to find a new site. Tr. 249. Alpert claims he asked Haston where he would locate the tower when he prepared the replies to the oppositions to the threshold showing and Haston told him he would use the Sam Chournos site and that he had Chournos' assurance for the site. Tr. 263-69. This conversation occurred when Alpert prepared the opposition to the motion to enlarge and the replies to the oppositions to the threshold showing.

Thomas Greenleigh's testimony

24. Thomas V. Greenleigh was President of Utah Broadcasting Corp., the former licensee of KJQN-FM. Abacus Exh. 3, at 1. He was also President of Sherman-Greenleigh-Sanchez Broadcasting of Utah, Inc., the parent corporation of Utah Broadcasting Corp. Greenleigh said he could not recall whether he discussed with Haston Utah Broadcasting's application for Promontory Point. *Id.*, at 3. He said that he did speak with Haston's engineer, Bruce Earle, about KJQN's proposal for Promontory Point sometime after October 1990, probably in November 1990, and in December 1990 he wrote to Haston about the permit. *Id.*; Tr. 64. When examined, however, Greenleigh said that Haston advised him about the move to Promontory Point. Tr. 45. The purchase agreement for the sale of the station was signed in December 1987 (Tr. 51) and the construction permit for Promontory Point was granted in December 1988. Tr. 52. Utah Broadcasting requested from the Commission more time to construct the new transmitter in July 1989 and in August 1989 the Commission was asked for permission to assign the license to Abacus. Tr. 63. Greenleigh claims that Utah Broadcasting obtained assurance for a site on land owned by Sam Chournos in June 1990. Tr. 69. The assignment of KJQN was approved by the Commission in October 1989. Tr. 72. Greenleigh represents that he could not recall whether he discussed with Haston the need for an extension of the construction permit when one was requested in June 1990. Tr. 71.

CONCLUSIONS

Abacus lacked candor in its threshold showing.

25. Abacus, the current operator of KJQN-FM, Ogden, Utah, in an attempt to improve its comparative status in this case, on January 9, 1992, filed a threshold showing in which it claimed that it would cover substantially more people and area than the now dismissed competing applicant, Rees Broadcasting. Abacus at the time of the filing of the request transmitted its signal from the same location proposed by Rees. Nevertheless, Abacus said that it would construct a new transmitter site, exercising the construction permit granted to the predecessor licensee, Utah Broadcasting. Abacus provided coordinates for a location on Promontory Point which the Commission had long been told by Utah Broadcasting was no longer available for KJQN's antenna. In addition, Abacus did not mention in its request that it told the Commission in January 1991 and again in July 1991 that it needed more time to request modification of the construction permit because it had not arranged for a new location to replace the one that Utah Broadcasting reported unavailable.

26. Not only did Abacus fail to explain how it could lay claim to a location on Promontory Point that the Commission had been told was not available but it also submitted engineering for the site. In July 1991, in answer to an inquiry from the Commission's staff, Abacus said it would need 60 more days to arrange for a new site. That time had come and gone by January 9, 1992 when Abacus filed the threshold showing and Abacus had not made good on its promise to the Commission to designate a new site.

27. The Mass Media Bureau immediately pointed out to the presiding officer that it was waiting for Abacus to file an application for modification of the construction permit and that Abacus had failed to inform the presiding officer that the very site claimed in the threshold showing was unavailable to Abacus. There could be no claim of greater coverage by Abacus, the Bureau urged, since the construction permit had expired and its request for an extension was pending. Furthermore, Abacus had never told the Commission where it would locate KJQN's transmitter if it did construct.

28. After the Bureau's opposition, Abacus conceded that it did not have assurance for the site it designated and described its claim as a mistake and one that was "purely inadvertent." In other filings Abacus described its failure to mention or discuss in the threshold showing the fact that it had repeatedly represented that it had not yet decided on a location for its transmitter as an "unintentional mistake." The President of Abacus, Garrett Haston, who was consulted about the threshold showing before it was filed by Abacus' counsel, Dan Alpert, and approved its filing, maintains it was Alpert's error, not his, and he claims he did not read the filing either before or after it was filed.

29. Abacus excuses the withholding of material facts from its threshold showing by arguing that it did have a site which it could have designated in place of the unavailable site it used in its filing. Moreover, Abacus maintains that the old unavailable site and the new site are technically comparable and thus no harm was done by withholding information. There is, however, insufficient support for Abacus' claim that it had a new site on January 9, 1992 when it filed the threshold showing. Neither Haston nor Alpert's testimony about when the new site was arranged for is credible. Alpert's testimony is inconsistent on the point. Alpert testified that he had conversations with Haston in which Haston gave him the "authority" to designate the Chournos site, the new site Abacus designated on March 27, 1992 after this issue was raised. But Alpert also said that when he prepared the threshold showing he did not know of any site for which Abacus had reasonable assurance. Haston attempted to leave the impression that he had taken steps to arrange for the Chournos site before January 1992 by having an engineer, Bruce Earle, talk to Sam Chournos in November or December 1990. But Earle

did not do any engineering for the Chournos site until this issue was raised and Haston admits that he did not speak to Chournos about the use of his land until February 1992.

30. Alpert also claims that he put the threshold showing together in a hurry and he never gave any thought to the exact location of the site that was being used in making a claim of coverage preference. But that argument is illogical and unbelievable under the circumstances presented here. Alpert is a longtime communications practitioner and had been directly involved in Abacus' representations to the Commission that it had no Promontory Point site. Moreover, Alpert testified that he did not independently determine anything about the site designated. He relied on Haston for those facts.

31. Haston said he asked Earle to inquire about the use of Chournos' land in November or December 1990. Following that purported inquiry, in January 1991, Haston told the Commission first that he had not decided where to locate KJQN's transmitter and would not decide until spring. In June 1991, Alpert wrote to Haston and told him that the Commission's staff had inquired about the site and that Haston would have to locate one before the permit would be extended. In July 1991, Abacus told the Commission that it had been negotiating with Utah Natural Gas but that those negotiations had failed. Abacus also told the Commission in July 1991 that it would file a modification of the construction permit within 60 days. But by August 1991, Haston, without informing the Commission, decided not to go forward with the transmitter change and had not reached a decision about whether he ever would until he knew what his full liability would be for the purchase of KJQN. It is apparent that Abacus has temporized in its filings about the new transmitter site to serve its own private and unrevealed interests.

32. Haston blames Alpert for not providing accurate and complete information in the threshold showing. He said he did not catch the error because his "lifestyle" is one in which he expects other people to read things for him. He claims to have a reading disability which makes him a slow reader. In this instance that explanation is disingenuous and amounts to a make weight argument. The threshold showing was only a double spaced page and a half long. The time needed for Haston to either have the showing read to him or for him to have read the document could not have been beyond his physical ability. It was apparent to the presiding officer that Haston had no trouble understanding complex matters during the hearing sessions when he testified. Haston is a graduate of the Harvard Business School and has taught college level courses in communications. Moreover, it is not believable that Haston did not know what was being represented. According to Alpert, Haston always provided information about the proposal and, thus, he never would have expected that Alpert would have independently developed information about the site. Haston admits that he and Alpert had a number of conversations while the showing was being prepared. Haston even arranged for the engineer to prepare the technical attachments to the threshold showing. Throughout his testimony Haston exhibited a willingness to remember only those matters which would serve his explanation and an inability to recall those that would not. Haston was fully aware that Abacus did not have a site on Promontory Point when the claim was made that it did.

33. The behavior of Abacus just recounted exhibits a lack of candor. These actions of its president and principal owner, Garrett Haston, involve concealment, evasion, and other failures to be fully informative. *See Fox River Broadcasting*, 93 F.C.C. 2d 127, 129 (1983). There is little question that Abacus exhibited ample motive for trying to deceive the Commission. At the time of the threshold filing, Abacus was faced with a competitor that was aggressively pursuing its application and because Abacus took control of KJQN after the license period, it did not stand in the same preferential position as a licensee which had a broadcast record to rest on. *See Memorandum, Opinion and Order*, FCC 92M-308, released March 11, 1992. In retrospect, Abacus' attempt to gain a preference with a false threshold showing does not appear very reasoned but at the time, in Abacus' view, it was a wilful act it hurriedly took. (There is substantial evidence that Abacus acted wilfully. It knew about the information withheld and it knew the information was material to the issue raised.) It is questionable, in light of Abacus' repeated failure to be forthright in its dealings with the Commission, whether it will operate KJQN consistent with the requirements of the Communications Act and the Commission's rules and policies. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179, 1209 (1986). Abacus has argued that some of the facts it withheld (but not all) had been reported to the Commission at other times. But the Presiding Officer and the parties cannot be expected to scour the Commission's files in other proceedings to uncover the material facts about a request. That is the duty of the applicant, the proponent of the request.

34. Abacus attempted to use the Commission's processes to gain a preference in this proceeding. Abacus directly represented in its filings that it had reported all the decisionally important facts. That statement is contrary to the record. It left out the principal facts which would have defeated its request. Not only did its filing subvert the hearing process but it cost the Commission extensive time to determine the truth.

35. During the hearing, Haston could remember those facts which served his interest and repeatedly stated that he did not recall the answers to questions, in the same time context, which sought to probe his responses and shed some light on his self-serving claims.[2] *See* TeleSTAR, *Inc.*, 2 FCC Rcd 7352, 7353 (1987) (Equitable resolution of lack of candor requires demeanor observations.). Haston's view that he should be able to blame his counsel is without merit. Both counsel and Haston gave inconsistent testimony about which one knew the correct facts and who had the responsibility for informing the presiding officer about them. Each said he looked to the other for information, but the burden was on Haston to insure that what was represented to the Commission was honest and reliable. *See RKO General, Inc. v. FCC*, 670 F.2d 217, 231 (D.C. Cir. 1981.) Abacus has not met that burden.

36. Following the close of the record and a week before the findings were due, Haston dismissed his second set of lawyers in this proceeding, Farhat and Bechtel, apparently over a fee dispute. The presiding officer had great difficulty determining from Haston whether Abacus intended to file findings and remain in the proceeding. When all the extensions had long since expired, Abacus was ordered to show cause why its application should not be dismissed for failure to prosecute. On the day the response to the order to show cause was due, Haston, on behalf of Abacus, filed an abridged copy of the Bureau's previously filed

findings. Thus, at the last possible moment as Abacus' application was about to be dismissed, Haston decided to comply with the Commission's rules. Haston's post hearing behavior only enhances the presiding officer's view that Haston is unlikely to follow Commission rules without substantial oversight by the agency.

37. "The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying." *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179, 1210. Moreover, the choice of remedies and sanctions is an area in which the Commission has broad discretion. *Id.*, at 1211. Abacus has exhibited a serious breach of trust. However, unlike the licensee who exhibits such behavior throughout the license term, Abacus' behavior has taken place in the last two years after the end of the license term and shortly after Abacus took control of the station. Because Abacus has only recently assumed control of KJQN, it is believed that it should not be denied a license but that its recent behavior makes a full license term unwarranted if the Commission is to insure that Abacus is fully qualified. Abacus will be granted a two year renewal. During that period Abacus will have a second opportunity to demonstrate that it will comply with Commission regulations and that it is a reliable licensee.

38. Abacus failure to provide truthful statements in this proceeding violated §1.17. In keeping with the standards and guidelines for forfeitures, Abacus should pay $10,000.00 for infractions described in this opinion. *See* Standards *for Assessing Forfeitures*, 6 FCC Rcd 4695, 4697 (1991), *reconsideration denied, Standards for Assessing Forfeitures*, FCC 92-212, released June 4, 1992, erratum released June 11, 1992.

Accordingly, IT IS ORDERED that the application of Abacus Broadcasting Corp. (File No. BRH-900530A2) for renewal of license of station KJQN-FM operating on 95.5 MHz at Ogden, Utah IS GRANTED for a period of two years from release of this decision.[3]

IT IS FURTHER ORDERED that Abacus Broadcasting Corp. IS ASSESSED a forfeiture penalty of $10,000.00 to be paid within 40 days following release of this decision as provided in 47 C.F.R. §1.80(h).

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Farhat and Bechtel appeared for Abacus at the hearing but withdrew as counsel on June 22, 1992. Proposed findings were filed by Garrett Haston, who is President of Abacus, on July 21, 1992.

[2] Although Haston stated that he was on the board of Sherman-Greenleigh-Sanchez Broadcasting of Utah, the parent licensee of KJQN, Utah Broadcasting, before he purchased the assets and that he regularly attended the annual board meetings, he could not recall whether moving the transmitter was discussed. Tr. 114, 117. Although he could remember discussing the cost of the move with Greenleigh (Tr. 117-18), he could not recall if he knew the status of the move when Abacus took control in October 1990. Tr. 119. He knew the original site owner, Gutherie, and they talked, but he could not recall whether they discussed KJQN's proposed move to Gutherie's tower and what transpired. Tr. 121. Haston claims he was the proponent of moving the tower but he could not recall or did not know where Utah Broadcasting proposed moving the tower. Tr. 125, 126. Even though he had an agreement to purchase the station's assets and the Commission had approved assignment of the license, he could not remember when he heard about Utah Broadcasting's 1990 promise to the Commission to find a new site, when the Gutherie site was lost. Tr. 135. Haston said he did not know why Utah Broadcasting did not build. Tr. 137, 140. When Greenleigh wrote to Haston in December 1990, after Abacus had assumed control, to tell him about the expired permit, Haston claims he never received the letter. While Haston can recall in great detail how the engineering was prepared for the threshold showing, he could not remember whether it was ever discussed where the tower would be located. Tr. 173-75. When pressed, he said he did not understand what was being done and became evasive. Tr. 177-79. Haston began his testimony by explaining that the idea of moving the tower to Promontory Point was his idea before Utah Broadcasting became the licensee but by the time the threshold showing was prepared, he was not sure he understood what was at issue.

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-33

In re Applications of

CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC.
Channel 202C3
Union Park, Florida — File No. BPED-881207MA

HISPANIC BROADCAST SYSTEM, INC.
Channel 202C3
Lake Mary, Florida — File No. BPED-891128ME

For Construction Permit for a New, Noncommercial, Educational FM Station

Appearances

Joseph E. Dunne, III on behalf of Central Florida Educational Foundation, Inc.; *James L. Oyster* on behalf of Hispanic Broadcast System, Inc.; and *James W. Shook* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: September 8, 1992; Released: September 16, 1992

1. On February 25, 1992, six mutually exclusive applicants were designated for hearing for several communities in Florida. *Hearing Designation Order*, 7 FCC Rcd 1875 (1992). Two applicants, Central and Hispanic, remain to be considered on the following issues:

1. To determine: (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; (b) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public interest and, if so, the terms and conditions thereof; and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair efficient and equitable distribution of radio service.

2. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), the extent to which each of the proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants; and whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

2. A prehearing conference was held on May 15, 1992. *Order*, FCC 92M-317, released March 23, 1992; Tr. 1-11. Written testimony and exhibits were exchanged on July 13, 1992. *Memorandum Opinion and Order*, FCC 92M-496, released April 27, 1992. A hearing session to receive testimony and exhibits was held on July 21, 1992. Tr. 12-40. No witnesses were examined on their testimony and the parties jointly submitted evidence on the §307(b) issue. Tr. 20. The record was closed on July 21, 1992. Tr. 40; *Order*, FCC 92M-810, released July 23, 1992. Proposed findings and conclusions were filed on August 10, 1992 by the Bureau, Central and Hispanic and Southwest and Bible, which have now been dismissed. On August 21, 1992, replies were filed by Central, Hispanic and the Bureau.

FINDINGS OF FACT

Issue 1: Which proposal would best provide a fair, efficient and equitable distribution of radio service.

3. Central proposes to use noncommercial FM Channel 202 at Union Park, Florida and Hispanic proposes to use the channel at Lake Mary, Florida. The findings, which follow on this issue, are from Joint Exhibit 1.

4. The population and land area within each applicant's predicted 1 m/Vm (60 dbu) contour are as follows:

Applicant	Area (sq. km.)	Population
Central	3,688	581,812
Hispanic	3,906	539,539

5. Neither applicant proposes a first noncommercial educational FM service within its proposed service area. The following is a comparison of the service each applicant would provide to area and populations which presently receive only one noncommercial educational FM service.

Applicant	Area (sq. km.)	Population
Central	1,090	184,775
Hispanic	1,225	138,791

6. The Joint Exhibit contains no information with respect to the populations of and number of transmission services licensed or allocated to the various communities proposed by Central and Hispanic.

7. Central and Hispanic would provide a third and fourth noncommercial educational FM service to the following areas and populations.

Applicant		Area (sq. km.)	Population
Central	3rd	1,870	184,565
	4th	728	212,472
Hispanic	3rd	1,847	184,552
	4th	834	216,196

Neither Central nor Hispanic would provide a fifth noncommercial educational FM service within their proposed service areas.

Issue 2: The extent to which Central and Hispanic's proposed operations will be integrated into the overall cultural and educational objectives of the respective applicants. Other factors in the record which demonstrate that Central or Hispanic will provide a superior FM educational broadcast service.

8. **Central** proposes to broadcast instructional programming produced by the Circle Community School in Orlando, Florida (which offers services to people who teach their children at home), Reformed Theological Seminary (which offers only graduate degrees in marriage and family counseling in Christian education, missionology, and ministry), Seminole County schools (which operates elementary and secondary public schools) and Stetson University (which is governed by an unidentified sect). Central Exh. 2. Central proposes to establish a student intern program, provide local programming service, Hispanic programming and Spanish language programming. Id. Central also proposes to provide information to parents who are teaching their children at home. *Id.* Central would provide Christian educational and instructional programming, programming in Spanish and English for "the personal and emotional needs of families," and programming for other interests in the community. *Id.*

9. Central states it will survey community leaders to determine community needs. Central Exh. 3. Central represents that two of its directors have been associated with broadcast stations or have broadcast experience. Central Exh. 5. Central also states that its directors have been involved in "Christian" education. Central Exh. 4. Central has prepared a list of four programs it will broadcast and a schedule. Central Exh. 6.

10. **Hispanic** is controlled by a board of directors whose members live in Puerto Rico and are Hispanic. Hispanic Exh. 1, at 1. Hispanic's cultural and educational objective is to provide Spanish "oriented," primarily secular, programming to Hispanic people within its proposed service area. Hispanic Exh. 2. The programming will be designed "to improve ability to comprehend and communicate in English." *Id.* It will be directed at English language comprehension and usage with Hispanics. *Id.* The programming will present cultural and religious information. *Id.* The programming will be made available to the Lake Mary School. *Id.* Hispanic's format will be directed at fostering harmony between two cultures. Hispanic Exh. 3. In addition, Hispanic will use the station to inform the Hispanic community about problems and needs in the service area. Hispanic Exh. 4. Hispanic has already conducted a telephone survey to determine community needs and problems. Hispanic Exh. 4.

11. Hispanic will teach English and American history and culture. Hispanic Exh. 3. Hispanic believes its programming will provide the non-Hispanic community with information about Spanish, Hispanic culture, and the needs of the Hispanic community. *Id.* Programming in Spanish language will be provided for the non-Spanish audience. *Id.* Hispanic has determined that there is a population to be served by its proposed programming. Hispanic Exh. 3.

12. Two of Hispanic's board members are experienced broadcasters and one of its principals is an experienced educator. Hispanic Exh. 5. Their experience will help Hispanic to effectuate its proposal. *Id.*

CONCLUSIONS

13. Section 307(b) considerations are dispositive of this case. Neither Central nor Hispanic will provide a first, full-time aural reception service. The record does not reflect that either one of them will provide a first local transmission service. Central and Hispanic will provide third and fourth services which are equal in importance. Central's overall service to 581,812 persons is 42,273 persons (or 8 percent) greater than that proposed by Hispanic. Central will also provide a second noncommercial educational FM service to 184,775 persons which is 45,984 (or 33 percent) more persons than Hispanic. Central is to be preferred over Hispanic for its provision of a second service. *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 2577 (Rev. Bd. 1991).

14. Central argues that it will provide a first local service to Union Park and that Union Park has greater needs. But as the Bureau points out, the evidence on this issue is governed by the Joint Exhibit and the Joint Exhibit is silent on the claims made by Central. Hispanic makes similar arguments about the merits of its proposal to serve Hispanic listeners. But again the §307(b) exhibit is silent on Hispanic's claims. Central's provision of service to a substantial gray area leads to the conclusion that its proposal will best serve the public interest.[1]

ACCORDINGLY, IT IS ORDERED that the petition for leave to amend filed August 17, 1992 by Central Florida Educational Foundation, Inc. IS GRANTED and the amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the application of Hispanic Broadcast System, Inc. (File No. BPED-891128ME) IS DENIED and the application of Central Florida Educational Foundation, Inc. (BPED-881207MA) for a new noncommercial FM broadcast station on Channel 202C3 at Union Park, Florida IS GRANTED provided:

> The permittee shall certify that an agreement is in effect requiring all stations to reduce power or cease operations as necessary to assure worker safety with respect to radiofrequency radiation when maintenance is performed at the site.
>
> Documentation demonstrating compliance with the ANSI radiofrequency radiation limit may be submitted in advance of the filing of FCC Form 302. The Commission's staff will review it for compliance and respond by letter stating whether automatic PTA has been reinstated.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] Hispanic argues for a shared use of the frequency but its argument is unsupported by a factual showing. No shared time proposal is made in the Joint Exhibit.

[2] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision
of Maryland, Inc.

Elkton, Maryland	MD0047
North East, Maryland	MD0048
Charlestown, Maryland	MD0280

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1992; Released: September 15, 1992

By the Commission:

1. The Commission has under consideration a "Response" filed by TCI Cablevision of Maryland, Inc. (TCI). TCI seeks a reduction of the Commission's November 5, 1991 Notice of Apparent Liability (NAL) for forfeiture in the amount of $23,750 for apparent violation of § 76.605 of the Commission's Rules regarding cable television signal leakage. *TCI Cablevision of Maryland, Inc.*, 6 FCC Rcd 6487 (1991). Based on various factors, TCI requests mitigation of the forfeiture to not more than $7,500. For reasons discussed herein, we deny mitigation.

2. On January 22 and 23, 1991, staff from the Commission's Field Operations Bureau at Baltimore, Maryland, inspected TCI's cable system serving Elkton, North East and Charlestown, Maryland. It was discovered that on both days, the cable system was emitting signal leakage in excess of the Commission's signal leakage standard and thus in violation of § 76.605 of the Rules. Additionally, based upon the magnitude of the emissions detected on January 23, 1991, it was also determined that the system's operation in such a manner constituted a threat to aeronautical communications and thus a threat to life and property. The Commission was guided in determining the amount of forfeiture by our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 70 RR 2d 1206 (1992). Under these standards, $12,500 is the base forfeiture for unauthorized signal emissions. Serious leakage problems in violation of § 76.605 were discovered on the first day of inspection. On the second day, the leakage measured was more severe and, in fact, exceeded the Cumulative Signal Leakage Index (CLI) criteria which was established to prevent interference to aeronautical communications. *See Second Report and Order in Docket 21006*, 99 FCC 2d 512 (1984). We found this latter signal leakage violation to be a substantial aggravating factor, because of the serious threat to the public safety caused by such operation. *See Paragon Communications*, 4 FCC Rcd 8739 (MMB 1989). Consequently, because the violation was egregious, applying the standards, we increased the forfeiture to $23,750. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

3. TCI argues that the forfeiture standards are actually rules rather than guidelines, and therefore are not enforceable because the Commission failed to follow the requirements of Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553, which requires an agency to provide public notice and comment prior to the adoption of a new rule. TCI claims that the NAL referenced the forfeiture standards in establishing a base forfeiture of $12,500 without discussion of the appropriateness of the base, and therefore, that the Commission is obligated to apply that base figure, subject only to adjustments provided for in the standards. TCI concludes that because the Commission is treating the standards as an obligation, the standards are, in effect, substantive rules which should have met the requirements of Section 553 of the APA.

4. TCI also contends that the NAL imposes a retroactively applied forfeiture, in that the signal leakage upon which the forfeiture is based preceded the adoption and release dates of the *Policy Statement*. TCI argues that the *Policy Statement* made it clear that the Commission intended to be "guided *in the future* by the standards . . . ." *Policy Statement, supra*, at 4695, and that the standards "would aid our enforcement efforts by making clear, *in advance*, the likely consequences of violations." *Id.* at 4696 (emphasis supplied). TCI contends that our application of the *Policy Statement's* guidelines in setting the amount of forfeiture is impermissible, where the actual violation occurred prior to the adoption and release of the *Policy Statement*. TCI emphasizes the *Policy Statement's* language, and argues that we intended licensees and registrants to be on notice only for prospective violations of the rules. TCI states that the Commission's practice in prior cases in this area had been to impose fines of no greater than $7,500, and that the imposition of a $23,750 forfeiture in this matter is a "substantial and abrupt departure" from our former practice. TCI also argues that it had a "reasonable expectation that given a certain set of circumstances, its liability would be at a certain level," and that it should not be held to have been on notice to the new standards "six months prior to their release."

5. Additionally, TCI contends that even if the *Policy Statement* was legitimately adopted and its allegedly retroactive application is deemed appropriate, the amount of forfeiture in the instant matter is not consistent with the standards set out in the *Policy Statement*. TCI argues that the maximum forfeiture allowable pursuant to the standards is $12,500, the base forfeiture for unauthorized signal emissions.

6. We have fully considered TCI's request for mitigation and find it unpersuasive. In regard to TCI's argument that the *Policy Statement* is actually a substantive rule rather than a general statement of policy, the Commission fully and carefully considered such arguments in our June 4, 1992 Order denying reconsideration of the *Policy Statement, supra*. In that document, we concluded that the *Policy Statement* is not a rule, for reasons stated therein, and thus, the Commission was not obligated to follow the public notice and comment provisions of Section 553 of the APA. Accordingly, we do not find TCI's arguments persuasive in this regard.

7. In regard to TCI's argument that our application of the *Policy Statement* is retroactive in nature, we note that the 1989 Congressional revision regarding increases in the Commission's forfeiture authority under the Communications Act of 1934, as amended, put cable operators on notice that violators of the Commission's rules could be

subject to substantially increased forfeitures. See 47 U.S.C. 503(b) (as amended by Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989)). The December 1989 revision of Section 503(2)(A) of the Act provides that "the amount of any forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act . . . ." Since cable operators are charged with knowledge of the law, TCI was on notice prior to the date of the subject violation that forfeiture amounts could be increased. Indeed, the Commission affirmatively attempted to bring this change in the law to the attention of its licensees and registrants. *See Amendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990); *News Release - FCC Forfeiture Authority Increased*, February 16, 1990. The *Policy Statement* was a particularization of the general authority granted by the statute. We do not view it as a limit on forfeitures for violations that occurred after the enactment of the statute, but before adoption of the *Policy Statement*. Under the circumstances, we find that the amount of forfeiture initially assessed in this proceeding was appropriate and our reliance upon the subsequently adopted guidelines set forth in the *Policy Statement* for administering the revised forfeiture penalties was not misplaced.[1]

8. TCI's argument that the Commission has not followed the *Policy Statement* in assessing a forfeiture of $23,750 for excessive signal emissions is not persuasive. TCI claims that there has been no showing of identifiable harm exceeding that of the unauthorized emissions, based on the signal leakage measurements taken on January 23, 1991. Therefore, TCI contends that a forfeiture of $12,500 would be appropriate according to guidelines set out in the *Policy Statement*. TCI argues that its response in making immediate repairs to remedy the excessive signal leakage must be seen as "a contradiction and vitiation of any allegation that TCI's operation constituted a serious threat to public safety." We disagree with TCI's contentions. As we stated in the November 5, 1991 Notice of Apparent Liability, the magnitude of the emissions measured on January 23, 1991 constituted a threat to aeronautical communications and was consequently an aggravating factor which warranted the higher forfeiture, since it endangered the public safety. *See Second Report and Order in Docket 21006, supra.* In addition, basing mitigation or cancellation of a forfeiture upon corrective action taken subsequent to the misconduct upon which liability is based would tend to encourage remedial rather than preventive action. *International Broadcast Corp.*, 19 FCC 2d 793, 794 (1969). In addition, we note that TCI has offered no explanation for the number or severity of leaks in its cable television plant in the instant matter.

9. Accordingly, IT IS ORDERED that pursuant to Section 1.80 of the Commission's Rules, the response filed by TCI to reduce the forfeiture imposed in the instant matter IS DENIED.

10. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, that TCI Cablevision of Maryland, Inc. SHALL FORFEIT to the United Stated of America the sum of twenty three thousand, seven hundred and fifty dollars ($23,750) for violation of Section 76.605 (a)(11) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] In any event, even if the *Policy Statement* were not applied, we believe the amount of the forfeiture is appropriate under Section 503(b) of the Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCI Cablevision of Colorado, Inc. Boulder, Colorado — CO0006

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1992; Released: September 15, 1992

By the Commission:

1. The Commission has under consideration a "Response" filed by TCI Cablevision of Colorado, Inc. (TCI). TCI seeks a reduction of the Commission's January 13, 1992, Notice of Apparent Liability (NAL) for forfeiture in the amount of $23,750 for apparent violation of § 76.605 of the Commission's Rules regarding cable television signal leakage. *TCI Cablevision of Colorado, Inc.*, 7 FCC Rcd 660 (1992). Based on various factors, TCI requests mitigation of the forfeiture to not more than $2,500. For reasons discussed herein, we deny mitigation.

2. On January 22, 1991 and February 5, 1991, staff from the Commission's Field Operations Bureau at Denver, Colorado, inspected TCI's cable system serving Boulder, Colorado. It was discovered that on both days, the cable system was emitting signal leakage in excess of the Commission's signal leakage standard and thus in violation of § 76.605 of the Rules. Additionally, based upon the magnitude of the emissions detected on January 22, 1991, it was also determined that the system's operation in such a manner constituted a threat to aeronautical communications and thus a threat to life and property. The Commission was guided in determining the amount of forfeiture by our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 70 RR 2d 1206 (1992). Under these standards, $12,500 is the base forfeiture for unauthorized signal emissions. Serious leakage problems in violation of § 76.605 were discovered both days of inspection, but on the first day of inspection the leakage was more severe and, in fact, exceeded the Cumulative Signal Leakage Index (CLI) criteria which was established to prevent interference to aeronautical communications. *See Second Report and Order in Docket 21006*, 99 FCC 2d 512 (1984). We found this initial signal leakage violation to be a substantial aggravating factor, because of the serious threat to the public safety caused by such operation. *See Paragon Communications*, 4 FCC Rcd 8739 (MMB 1989). Consequently, because the violation was egregious, applying the standards, we increased the forfeiture to $23,750. The amount specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

3. TCI argues that the forfeiture standards are actually rules rather than guidelines, and therefore are not enforceable because the Commission failed to follow the requirements of Section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553, which requires an agency to provide public notice and comment prior to the adoption of a new rule. TCI claims that the NAL referenced the forfeiture standards in establishing a base forfeiture of $12,500 without discussion of the appropriateness of the base, and therefore, that the Commission is obligated to apply that base figure, subject only to adjustments provided for in the standards. TCI concludes that because the Commission is treating the standards as an obligation, the standards are, in effect, substantive rules which should have met the requirements of Section 553 of the APA.

4. TCI also contends that the NAL imposes a retroactively applied forfeiture, in that the signal leakage upon which the forfeiture is based preceded the adoption and release dates of the *Policy Statement*. TCI argues that the *Policy Statement* made it clear that the Commission intended to be "guided *in the future* by these standards . . . ." *Policy Statement, supra*, at 4695, and that the standards "would aid our enforcement efforts by making clear, *in advance*, the likely consequences of violations." *Id.* at 4696 (emphasis supplied). TCI contends that our application of the *Policy Statement's* guidelines in setting the amount of forfeiture is impermissible, where the actual violation occurred prior to the adoption and release of the *Policy Statement*. TCI emphasizes the *Policy Statement's* language, and argues that we intended licensees and registrants to be on notice only for prospective violations of the rules. TCI states that the Commission's practice in prior cases in this area had been to impose fines of no greater than $7,500, and that the imposition of a $23,750 forfeiture in this matter is a "substantial and abrupt departure" from our former practice. TCI also argues that it had a "reasonable expectation that given a certain set of circumstances, its liability would be at a certain level," and that it should not be held to have been on notice to the new standards "six months prior to their announcement."

5. Additionally, TCI contends that even if the *Policy Statement* was legitimately adopted and its allegedly retroactive application is deemed appropriate, the amount of forfeiture in the instant matter is not consistent with the standards set out in the *Policy Statement*. TCI argues that the maximum forfeiture allowable pursuant to the standards is $12,500, the base forfeiture for unauthorized signal emissions.

6. We have fully considered TCI's request for mitigation and find it unpersuasive. In regard to TCI's argument that the *Policy Statement* is actually a substantive rule rather than a general statement of policy, the Commission fully and carefully considered such arguments in our June 4, 1992 Order denying reconsideration of the *Policy Statement, supra*. In that document, we concluded that the *Policy Statement* is not a rule, for reasons stated therein, and thus, the Commission was not obligated to follow the public notice and comment provisions of Section 553 of the APA. Accordingly, we do not find TCI's arguments persuasive in this regard.

7. In regard to TCI's argument that our application of the *Policy Statement* is retroactive in nature, we note that the 1989 Congressional revision regarding increases in the Commission's forfeiture authority under the Communications Act of 1934, as amended, put cable operators on notice that violators of the Commission's rules could be

subject to substantially increased forfeitures. See 47 U.S.C. § 503(b) (as amended by Pub. L. No. 239, 101st Cong., 1st Sess., 103 Stat. 2131 (1989)). The December 1989 revision of Section 503(2)(A) of the Act provides that "the amount of any forfeiture penalty determined under this section shall not exceed $25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $250,000 for any single act or failure to act . . . ." Since cable operators are charged with knowledge of the law, TCI was on notice prior to the date of the subject violation that forfeiture amounts could be increased. Indeed, the Commission affirmatively attempted to bring this change in the law to the attention of its licensees and registrants. *SeeAmendment of Section 1.80 of the Commission's Rules to Modify Forfeiture Amounts*, 5 FCC Rcd 3708 (1990); *News Release - FCC Forfeiture Authority Increased*, February 16, 1990. The *Policy Statement* was a particularization of the general authority granted by the statute. We do not view it as a limit on forfeitures for violations that occurred after the enactment of the statute, but before adoption of the *Policy Statement*. Under the circumstances, we find that the amount of forfeiture initially assessed in this proceeding was appropriate and our reliance upon the subsequently adopted guidelines set forth in the *Policy Statement* for administering the revised forfeiture penalties was not misplaced.[1]

8. We find TCI's argument that the assessed forfeiture of $23,750 be reduced to no more than $2,500 for its good faith attempt to comply with the Commission's signal leakage requirements to be unpersuasive. TCI does not deny the existence of the signal leaks found on its Boulder, Colorado system, but it contends that the cited leaks "both individually and in total, at most constitute minor violations." This does not comport with our findings. A minor violation would not exceed the CLI limitations established by § 76.611 of the Rules. TCI also argues that it has been more than diligent in maintaining signal leakage integrity through its monitoring program. Indeed, it emphasizes that up to January 22, 1991, when the Commission's inspection took place, it had one full-time employee whose sole responsibility was to monitor the system. It maintains that all detected leaks over 200 uV/m were repaired immediately upon discovery. TCI avers that it has since increased its monitoring requirements to include 100% of its cable plant every month. While we note this improvement in its monitoring program, it is evident from the facts before us that the former program was inadequate to ensure full compliance with our signal leakage standards. In the instant case, not only were signal leaks found in our January 22 and February 5, 1991 inspections, but also in previous inspections. Of the leaks we are concerned with herein, even if we discount those which TCI states were the result of customer tampering and/or inadvertent damage, we cannot ignore the egregious leak discovered on January 22, 1991 at the Hotel Boulderado, measured at 1746 uV/m. This leak alone put the system in violation of the CLI restrictions. TCI cannot have been unaware of the severe problems at this location, particularly when it states that prior to our inspection it replaced a number of directional couplers and fittings at the hotel on June 19, 1990. Only after the Commission's January 22, 1991 inspection, however, did TCI decide to begin complete rewiring of the hotel, a job which was not completed until April 1991.

9. Cable operators, such as TCI, have an obligation to detect and repair leakage during the course of their Commission mandated routine monitoring. However, a monitoring program does not relieve a cable operator of its obligation to insure the integrity of its cable system at all times merely because it conducts quarterly or monthly inspections, just as the absence of excessive signal leakage would be no defense to a charge of failing to perform regular system monitoring. The monitoring standard of § 76.614 and the signal leakage criteria of Section 76.605(a)(11) reflect separate, distinct obligations. These requirements are intended to function together to reduce the risk of destructive interference to vital aeronautical communications and navigation signals. *See Liability of Raystay Co. d/b/a TV Cable of Carlisle*, 65 RR 2d 1191 (1988). The suggestion that we permit TCI to avoid one of its principal obligations in controlling such potentially dangerous interference on the grounds that it complied with a different, though similarly motivated, rule is neither reasonable nor acceptable. As we stated in the January 13, 1992 Notice of Apparent Liability, the magnitude of the emissions measured on January 22, 1991 constituted a threat to aeronautical communications and was consequently an aggravating factor which warranted the higher forfeiture, since it endangered the public safety. *See Second Report and Order in Docket No. 21006, supra*. Moreover, it is also well settled that subsequent corrective action will not relieve liability nor avoid a forfeiture. *See e.g., Gold Beach Cable TV* (Gold Beach, Oregon), released February 28, 1986; and *Executive Broadcasting Corp.*, 3 FCC 2d 299 (1969). In addition, basing mitigation or cancellation of a forfeiture upon corrective action taken subsequent to the misconduct upon which liability is based would tend to encourage remedial rather than preventive action. *International Broadcasting Corp.*, 19 FCC 2d 793, 794 (1969).

10. Accordingly, IT IS ORDERED that pursuant to Section 1.80 of the Commission's Rules, the response filed by TCI to reduce the forfeiture imposed in the instant matter IS DENIED.

11. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, that TCI Cablevision of Colorado, Inc. SHALL FORFEIT to the United States of America the sum of twenty three thousand, seven hundred and fifty dollars ($23,750) for violation of Section 76.605(a)(11) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] In any event, even if the *Policy Statement* were not applied, we believe the amount of the forfeiture here is appropriate under Section 503(b) of the Act.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

BHC ASSOCIATES,
LIMITED
PARTNERSHIP
(Assignor)

and File No. BAPCT-891113KG

BIG HORN
COMMUNICATIONS, INC.
(Assignee)

For Consent to Assign the
Construction Permit for
Station KPQD-TV, Channel 6,
Billings, Montana

ORDER

Adopted: August 31, 1992; Released: September 15, 1992

By the Commission:

1. The Commission has before it for consideration: (a) a staff action of May 3, 1991, granting the application for assignment of the construction permit for Station KPQD-TV, Channel 6, Billings, Montana from BHC Associates, Limited Partnership to Big Horn Communications, Inc. ("Big Horn") and denying the petition to deny filed by Comanche Enterprises ("Comanche"); (b) an action by the staff dated March 12, 1992, denying Comanche's petition for reconsideration of the earlier denial of its petition to deny; (c) Comanche's application for review of the March 12, 1992 order denying reconsideration; (d) Big Horn's opposition to the application; and (e) Comanche's reply to Big Horn's opposition.

2. We have examined the application for review in which Comanche merely restates its disagreement with the staff's conclusions regarding its allegations. Further, we have reviewed the staff's analysis of the issues raised and conclude that the matter was fairly considered and properly decided.

3. Accordingly, IT IS ORDERED, That, in accordance with Section 1.115(g) of the Commission's rules, the application for review filed by Comanche IS DENIED.

4. Finally, copies of this *Order* shall be sent Certified Mail--Return Receipt Requested to the parties to this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 15, 1992

PACIFIC'S NOTIFICATION OF ENHANCED SERVICE MARKET TRIAL FOR FAX STORE AND FORWARD

(CC DOCKET NO. 88-616)

On August 26, 1992, Pacific Bell (Pacific) filed a notification of a market trial of a facsimile (FAX) Store and Forward Service. Pacific states that its FAX Store and Forward Service will use the electronic messaging capabilities of its FAX Message Machine to provide customers with new options for sending, receiving, and storing FAX messages. In particular, Pacific will offer three services during the trial -- FAX Overflow, FAX Mail, and FAX for Information Providers.

In addition, Pacific describes its plans for complying with the Commission's conditions for conducting enhanced services market trials without filing comparably efficient interconnection (CEI) plans and market trial waivers. *See BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services*, 4 FCC Rcd 1266 (1989). Pacific plans to start the market trial on December 7, 1992, ninety days from the date of its notification.

Pacific's Notification is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies may also be obtained from the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Copies of Pacific's Notification be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Alexander E. Macpherson
(Transferor)

and BTCCT-910827KE

Robert W. Sudbrink
and Marion Sudbrink
(Transferees)

For Consent to Transfer of Control
of Macpherson Broadcasting of
Kentucky, Inc., Permittee of Unbuilt
Station WDKA(TV), Paducah, Kentucky

and BPCT-911209KF

Macpherson Broadcasting
of Kentucky, Inc.

To Replace Expired
Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 1992; Released: September 15, 1992

By the Commission:

1. The Commission has before it for consideration: (1) the above-captioned application for consent to the transfer of control of Macpherson Broadcasting of Kentucky, Inc., permittee of unbuilt station WDKA(TV), channel 49, Paducah, Kentucky, from Alexander E. Macpherson (transferor) to Robert W. Sudbrink (51%) and Marion Sudbrink (49%) (hereafter the transferor and the Sudbrinks will be referred to jointly as the applicants);[1] (2) petitions to deny the application filed by Engles Communications, Inc. (Engles), licensee of station KBSI(TV), Cape Girardeau, Missouri, and Paducah Newspapers, Inc., licensee of WPSD-TV, Paducah, Kentucky (jointly referred to as Petitioners);[2] (3) a joint opposition to the petitions to deny filed by the applicants; (4) the above-captioned application to replace WDKA(TV)'s expired construction permit; and (5) an informal objection to the application to replace the expired construction permit filed by Engles. The Sudbrinks own the licensee of station WCEE(TV), channel 13 (IND), Mt. Vernon, Illinois, and the acquisition of control of the construction permit for WDKA(TV) will result in the overlap of the predicted Grade B contour of that station with that of commonly controlled WCEE(TV). However, the Sudbrinks propose to operate WDKA(TV) as a satellite of WCEE(TV) pursuant to the exception for satellite operations set forth in Note 5 of the Commission's multiple ownership rule for television stations, Section 73.3555(a)(3).

2. **General Policy.** Under the Commission's policy concerning television satellite operations, *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (*Satellite Report and Order*) (petitions for partial stay and reconsideration pending), an applicant for television satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if it meets the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Satellite Report and Order*, 6 FCC Rcd at 4213-14. Applications meeting these criteria, when unrebutted, will be viewed favorably by the Commission. *Id.* at 4214. We now turn to the proposal and pleadings before us.

3. **Criterion I.** With respect to the first criterion needed to qualify for the presumption, the applicants claim that since there is no overlap of the City Grade contours of WCEE(TV) and WDKA(TV), the satellite proposal meets the first component of the presumption. The Petitioners contend that no engineering data were submitted to support the assertion that there is no city grade overlap. However, Petitioners did not submit any engineering study of their own. Subsequently, the applicants submitted an engineering study which clearly demonstrates that there will be no overlap of the City Grade contours of the stations. In fact, they fall 22 km (14 miles) apart. Thus, the satellite proposal meets the first component of the presumption.

4. **Criterion II.** With respect to the second criterion, applicants must demonstrate that an area is underserved using one of two tests. The first is a "transmission test," whereby a proposed satellite's community of license is considered underserved if there are two or fewer full-service stations already licensed to it. The second is a "reception test," which would consider an area underserved if 25 percent or more of the area within the proposed satellite's Grade B contour (but outside the parent's Grade B contour) receives four or fewer services, not including the proposed satellite service. *Satellite Report and Order*, 6 FCC Rcd at 4215. The applicants state that their proposal meets the "transmission test" because there are only two full-service television stations licensed to Paducah, Kentucky; namely, commercial station WPSD-TV and noncommercial station WKPD(TV).

5. Petitioners argue that the applicants' proposal should be considered under the "reception test" since the area is not underserved because of its proximity to other communities. In this regard, they claim that Paducah is not an isolated community but is part of a hyphenated television

[1] Robert W. Sudbrink currently holds a nonattributable interest as a nonvoting stockholder in the permittee of WDKA(TV).
[2] AFLAC Broadcast Partners, licensee of KFVS-TV, Cape Girardeau, Missouri, filed a letter incorporating by reference the matters raised by Petitioners' pleadings.

market with Cape Girardeau, Missouri and Harrisburg-Marion, Illinois. Petitioners note that the Paducah, Kentucky-Cape Girardeau, Missouri-Harrisburg-Marion, Illinois market is ranked by Arbitron as the 76th largest market with 332,800 television households, and is served by six commercial and three noncommercial television stations that are licensed to communities in the market.[3] Further, Petitioners maintain that since WDKA(TV) will rebroadcast substantially all of the programs of WCEE(TV), and allegedly will not originate any programming specifically for the Paducah community, the applicants should not be credited with bringing service to an underserved area. Simply by stating that the proposed satellite is a Paducah station, they assert, will not make up for the absence of local programming.

6. The applicants note that they rely on the "transmission test," and that the Petitioners' contentions regarding the "reception test" are irrelevant. In any event, they aver that Petitioners have failed to submit evidence establishing that less than 25% of WDKA(TV)'s service area receives four or more Grade B services. 6 FCC Rcd at 1414 and 1415. Additionally, they assert that the "reception test" argument should be rejected for two basic reasons. First, because Paducah Newspapers, Inc., one of the Petitioners, owns and operates the only daily newspaper as well as the only VHF network affiliated station licensed in Paducah, the need to provide Paducah with a first competitive commercial voice is imperative. Second, since the stations licensed to communities in the hyphenated television market are widely separated and are in different states, they cannot be expected to provide meaningful local programming to Paducah and the Western Kentucky area. In this regard, the applicants note that Cape Girardeau is over 85 km (53 miles) northwest of Paducah, while Harrisburg and Marion, Illinois are respectively 81 km (50 miles) and 78 km (48 miles) north of Paducah. Moreover, the applicants aver that since these communities are located far to the North of Paducah, none of the stations licensed to these communities reach the southern portion of WDKA(TV)'s proposed service area.

7. Our satellite policy permits applicants to comply with the second criterion by demonstrating that the proposed satellite would provide service to an underserved area based on one of two tests, the "transmission test" or the "reception test." In revising our satellite policy, we provided applicants with a choice of tests to qualify for the presumption, because meeting either test serves a distinct public interest goal. We did not state or suggest that greater weight would be accorded to one of the tests in communities located in certain type markets. Thus, if an applicant can show that its proposal meets either the "transmission" or the "reception" test, absent rebuttal, it is entitled to the presumption that the proposed satellite would provide service to an underserved area. Here, the Petitioners have not rebutted the fact that the applicants meet the "transmission test." Moreover, the Petitioners have demonstrated no basis for a departure from our stated policy. Further, while the Paducah, Kentucky-Cape Girardeau, Missouri-Harrisburg-Marion, Illinois ADI is served by a number of stations, we note that these stations are licensed to communities that are widely separated, and are located in three different states. We do not believe that the stations licensed to communities in other states can reasonably be expected to satisfy fully the needs of Paducah for television service. The Sudbrinks state that they intend to build a local studio in Paducah with the capability of producing local public affairs programming. Initially, they aver, the station will broadcast thirty minutes of locally produced (and Paducah oriented) public affairs programming each week with plans to increase the local programming as soon as operating income permits. Accordingly, we conclude that the applicants' proposal meets the "transmission test" demonstrating that the proposed satellite will provide service to an underserved area.

8. **Criterion III.** To satisfy the third criterion of the satellite presumption, the applicants must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the station as a full-service television station. Based on the transferor's experience as a banker, the applicants contend that the construction of WDKA(TV) cannot be financed as a stand-alone UHF station. In that regard, the applicants state that $371,000 have already been expended to finance the station. They also assert that WDKA(TV) is not an attractive full-service facility because Paducah has a population of only 29,315. Inquiries to a broker, the applicants aver, resulted in a negative response even to the listing of the unbuilt station. The Sudbrinks maintain that the operation of WCEE(TV), located 161 km (100 miles) away in a similar community, Mt. Vernon, having only 16,995 persons, supports their conclusion that WDKA(TV) cannot survive as a stand-alone station. In that respect, they note that WCEE(TV) has lost money for many years and that since they acquired the station in January 1986 the station has lost $2,712,373.

9. The Petitioners argue that the applicants have failed to present documentation of their efforts to find a buyer or to show a history of television station failures in the market. Moreover, Petitioners maintain that the undocumented and vaguely described efforts attributed to a broker who is an interested party to the proposal (*i.e.*, president of WCEE(TV)) fall short of the requirements under the third criterion. Additionally, they allege that the applicants have failed to demonstrate the economic necessity of operating WDKA(TV) as a satellite station. Petitioners assert that the performance of WCEE(TV) in a community approximately half the size of Paducah that faces significant competition from the St. Louis market does not demonstrate anything about the prospects of a Paducah station.

10. In opposition, the applicants maintain that the Petitioners have offered no information of their own that demonstrates that WDKA(TV) could survive as a full-service independent operation. In fact, they state that the Petitioners should be in a position to know the difficult financial circumstances of stations in the market because Engles Communications, one of the Petitioners, acquired KBSI-TV, Cape Girardeau, Missouri, out of bankruptcy

[3] The commercial stations are: KBSI(TV), channel 23, Cape Girardeau, Missouri (Fox); KFVS-TV, channel 12, Cape Girardeau, Missouri (CBS); KPOB-TV, channel 15, Popular Bluff, Missouri (ABC); WPSD-TV, channel 6, Paducah, Kentucky (ABC); WSIL-TV, channel 3, Harrisburg, Illinois (satellite of ABC affiliate KPOB-TV); and WTCT(TV), channel 27, Marion, Illinois (Ind.). The noncommercial stations are: WKMU(TV), channel 21, Murray-Mayfield, Kentucky; WKPD(TV), channel 29, Paducah, Kentucky; and WSIU-TV, channel 8, Carbondale, Illinois.

after a multiple station owner was unable to make a financial success of the station as a full-service independent operation. Additionally, concerning the comparability of Paducah and Mt. Vernon (WCEE(TV)'s community of license), the applicants assert that even if the economic conditions in these communities were not considered sufficiently comparable, the conditions in Cape Girardeau and Paducah are similar.[4] Compounding the problem of financial viability in Paducah, the applicants argue, is the fact that WPSD-TV and Paducah's only daily newspaper are commonly owned. Because of this media monopoly, the applicants maintain, a grant of their request would serve the public interest by providing Paducah with a competitive media voice. In this regard, they note that WDKA(TV) will broadcast local public affairs programming.[5]

11. Concerning their efforts to sell the construction permit for WDKA(TV), the applicants submitted a Declaration from Harold W. Gore, the station's broker, detailing his qualifications and his efforts to find a buyer. Mr. Gore notes that he is currently the president of Sudbrink Broadcasting of Midwest, Inc;[6] he has owned and operated several broadcast properties for over thirty years; from May, 1984 until March, 1990 he was a vice president of the brokerage firm of H.B. LaRue Media Brokers; and that he has continued to operate as a media broker since that time. Mr. Gore asserts that after completing an analysis of the market, he presented the construction permit to several Midwest broadcasters. However, he states that the consensus among the independent broadcasters was that the market could not support an independent television station. Mr. Gore avers that while formal presentations were made to three interested groups, they were unsuccessful because the clients were unable to obtain financing. Additionally, Mr. Gore states that in his efforts to find a buyer for the construction permit he enlisted the help of John L. Pierce, a Kentucky media broker, who made several unsuccessful contacts with potential buyers.[7] The applicants maintain that both the unsuccessful efforts of the brokers to find a buyer for the construction permit for WDKA(TV) and the bankruptcy of the former licensee of KBSI-TV in a comparable community in the market, satisfy the final element of the satellite station policy test.

12. We believe that the applicants have satisfied the third criterion. The applicants submitted detailed information concerning their efforts to find parties to purchase the construction permit. Although these efforts included the services of a media broker who is an interested party, we note that his findings have been confirmed by another broker. While potential buyers were found, apparently they were unable to obtain the necessary financing for the construction of an independent UHF station. Based upon the above, we believe that the transferor has demonstrated his diligence in trying to find a buyer. Petitioners have not successfully rebutted the applicants' contentions in this regard.

13. **Extension Application.** On December 9, 1991, the permittee filed an application (FCC Form 307) to replace its construction permit (BPCT-911209KF), which had expired on November 20, 1991, four months after the subject application was filed. The permittee indicated that with the transfer of control application pending, it inadvertently failed to file a timely application for extension of time to construct. This is the applicant's first extension request. Engles' informal objection to the extension request essentially states that the permittee had not made substantial progress toward completion of construction. *See* Section 73.3534(b)(2) of the Rules. While the transferor may not have made "substantial progress" toward construction, it appears that this was due to circumstances clearly beyond the control of the permittee and that steps were taken to resolve the problems. 47 C.F.R. Section 73.3534(b)(3). The transferor states that when he acquired WDKA(TV) and determined that the site was unsatisfactory at the end of August 1989, there were twenty-one months left for the initial construction period. During the remaining construction period, he asserts, three months were required to locate a usable site. Construction at the site ran into difficulties due to a variety of problems, including the permittee's inability to obtain FAA clearance for the tower. The permittee stated that it took another eighteen months to obtain authorization from the FAA. Moreover, the transmitter has been purchased and is on hand, a 50% down payment has been made on the wave guide, and the permittee has completed its negotiations for the antenna. Thus, the transferees are in a position to move forward immediately and continue the progress initiated by the permittee, upon grant of the transfer of control application. Accordingly, we will grant its application to replace the expired construction permit, and deny the informal objection filed by Engles.

14. **Conclusion.** In view of the foregoing, we find that the applicants are entitled to the presumption that the proposed satellite operation of WDKA(TV), Paducah, Kentucky, is in the public interest. Additionally, we find that the Petitioners have failed to rebut this presumption and to demonstrate that grant of the satellite application is not in the public interest. We will, however, in accordance with our general policy of not authorizing 100 percent satellites in areas served substantially by stations that qualify as conventional television operations, require that the proposed station construct a main studio within twelve (12) months after the date of commencement of program

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[4] The applicants state that the comparison was appropriate. They observe that while Mt. Vernon is a smaller community, WCEE(TV) has no competing station, is over 117 km (73 miles) from St. Louis, and is a VHF station having lower operating costs.

[5] The Sudbrinks state that if the subject application is granted, they intend to build modest facilities. They assert that the expected savings in construction (approximately $1 million) and operating costs (approximately $17,000 to $20,000 per month) will make available additional capital which will be used to improve the program quality of both stations.

[6] Mr. Gore notes that his first efforts to find a buyer interested in acquiring WDKA-TV occurred between January and April 1990, at a time when he was engaged fulltime as a media broker and before he became affiliated with Sudbrink Broadcasting of Midwest, Inc.

[7] For example, in his Declaration, Mr. Pierce confirms his unsuccessful presentation to Pollack Communications and concludes, based on his contacts with both potential operators and their financing sources, that communities the size of Paducah, in the Kentucky area, are not capable of supporting an independent full-service television station. The problem is more severe in Paducah, he states, because the competition for advertising revenues is with a network affiliated VHF station owned by Paducah Newpapers, Inc., the only daily newspaper in the area.

test authority. Based on the foregoing, having determined that the applicants are qualified in all other respects, we find that grant of the application would serve the public interest.

15. Accordingly, IT IS ORDERED, That the petition to deny and the informal objection filed by Engles Communications, Inc., and the petition to deny filed by Paducah Newspapers, Inc., ARE DENIED.

16. IT IS FURTHER ORDERED That the above-captioned application (BPCT-911209KF) to replace the construction permit for unbuilt station WDKA(TV), Paducah, Kentucky, IS GRANTED.

17. IT IS FURTHER ORDERED That the above-captioned application (BTCCT-910827KE) for consent to the transfer of control of Macpherson Broadcasting of Kentucky, Inc., permittee of unbuilt station WDKA(TV), Paducah, Kentucky, from Alexander E. Macpherson to Robert W. Sudbrink and Marion Sudbrink IS GRANTED, subject to the following condition:

> That Macpherson Broadcasting of Kentucky, Inc. shall construct and maintain a main studio within twelve (12) months after the date of commencement of program test authority.

18. IT IS FURTHER ORDERED, That copies of this Memorandum Opinion and Order shall be sent Certified Mail-Return Receipt Requested to the parties to this proceeding by the Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 92-3

ORDER

Adopted: September 1, 1992; Released: September 16, 1992

By the Deputy Bureau Chief, Operations, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 31, 1991, the Bell Atlantic Telephone Companies (Bell Atlantic) filed revisions to the Cost Allocation Manual (CAM) that Bell Atlantic uses to allocate costs between regulated and nonregulated activities. The Public Service Commission of the District of Columbia (DCPSC) filed comments requesting clarification of portions of the CAM, and Bell Atlantic filed a reply. In this order we approve Bell Atlantic's revisions subject to the changes described below.

2. In the *Joint Cost Order*,[1] the Commission required Tier 1 carriers to file manuals describing the methods they use to separate the costs of regulated telecommunications services from the costs of nonregulated activities. Bell Atlantic filed its original CAM on August 10, 1987. In its CAM, Bell Atlantic describes its nonregulated activities, lists the activities it proposes to treat as incidental, and provides information on its affiliate transactions, employee time reporting procedures, and cost apportionment methods. Bell Atlantic filed revisions pursuant to two Bureau orders and has subsequently filed routine quarterly updates.[2]

II. SUMMARY OF COMMENTS AND DISCUSSION

A. License and Support Activities Related to Intellectual Property

3. In the nonregulated activities section of its CAM, Bell Atlantic revised the description of activities related to the licensing of software and other intellectual property and related support activities. Support activities are described as installing, enhancing, customizing and providing other support services as requested by customers.[3] Before this revision, Bell Atlantic's CAM indicated that all licensing of software was recorded as an incidental activity[4] and that license support was a nonregulated activity. In its revised CAM, Bell Atlantic makes a distinction between the licensing of software that was regulated in origin and the licensing of software that was nonregulated in origin. Under the revised CAM, the licensing of software that was regulated in origin would continue to be accounted for as an incidental activity, but the licensing of software that was nonregulated in origin would be accounted for as a nonregulated activity. In the revised CAM, Bell Atlantic continues to describe license support as a nonregulated activity regardless of the origin of the related software.[5]

4. DCPSC claims that there is ambiguity in the revised CAM as to Bell Atlantic's treatment of costs incurred after the licensing of intellectual property developed for a regulated application. DCPSC indicates that, although the CAM states that the support activities are a nonregulated activity, no mention is made of how Bell Atlantic intends to record the expenditures for the nonregulated support activities. The DCPSC states that in its view there should be a statement that the expenditures will be recorded as nonregulated. DCPSC also contends that if a support activity is of joint benefit to both the regulated entity and the unregulated customer, Bell Atlantic should either choose (1) to allocate the cost between the nonregulated activity and the regulated operations and assign the revenue accordingly, or (2) to assign the revenue and cost to the regulated entity.[6]

5. In its reply Bell Atlantic states that its CAM clearly shows that license support activities will be recorded as nonregulated. Bell Atlantic also states that when software developed for regulated use is further enhanced or customized for regulated use and then provided to licensees, the revenues from the license activity will be recorded as incidental.[7]

6. After reviewing the revised CAM, the DCPSC's comments, and Bell Atlantic's reply we conclude that there is no significant disagreement among the parties. In this section of its CAM the only substantive change Bell Atlantic made was to distinguish between the licensing of software developed for regulated use, which would be recorded as incidental and thus would be in the regulated

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[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket 86-111, 2 FCC Rcd 1298 (*Joint Cost Order*), *recon.*, 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order*), *aff'd sub nom* Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

[2] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 496 (Com.Car.Bur.) (*Compliance Order*), *recon. in part*, 4 FCC Rcd 4631 (Com.Car.Bur. 1989), *aff'd*, 5 FCC Rcd 2551 (1990); 3 FCC Rcd 109 (Com.Car.Bur. 1988) (*Bell Atlantic Order*).

[3] Bell Atlantic CAM, Section II, pg. 10.

[4] Incidental activities are an outgrowth of regulated operations and are recorded in regulated accounts as provided in §§32.14(d) and 32.4999(k) and (l).

[5] *Id.*

[6] DCPSC Comments, pp. 2-3.

[7] Bell Atlantic Reply, pp. 1-2.

accounts, and the licensing of software developed for nonregulated use, which would be recorded as nonregulated. The DCPSC has not expressed any concern about this change. The concern expressed by DCPSC relates to the treatment of license support activities which were nonregulated under the previous CAM and continue to be nonregulated in the revised CAM. Even there DCPSC's primary concern appears to be that Bell Atlantic describes the licence support activity as nonregulated but does not state specifically that it will be recorded as nonregulated. In our view when Bell Atlantic states in its CAM that an activity is nonregulated, it must account for that activity as nonregulated. Nevertheless, we believe that it would be beneficial to clarify the CAM so that there is no question that the support activities are accounted for as a nonregulated activity and direct Bell Atlantic to make the necessary clarification.

7. We do not agree with DCPSC's contention that some portion of the revenues and expenses associated with support activities should be allocated between regulated and nonregulated operations. By definition support activities are services provided to software customers at the customers' request. If a service similar to support services, such as a software enhancement, provides benefit to the regulated activities, it would not be a support activity as defined by Bell Atlantic in this section of its CAM. Thus, we find DCPSC's concerns in this area to be unfounded.

B. Affiliate Transaction with NSI

8. DCPSC observes that Section V of the CAM states that Bell Atlantic Network Services, Inc. (NSI), a subsidiary of Bell Atlantic, provides miscellaneous business supplies to the Bell Atlantic telephone companies at a "market rate." DCPSC indicates that it understands that NSI provides these supplies at fully distributed cost as required by §32.27(d) of the Commission's Rules and suggests that the CAM be corrected. Bell Atlantic agrees that a CAM change is appropriate. Bell Atlantic states that it will remove the separate listing for miscellaneous business supplies because those transactions are already covered by the transactions described as materials management.

9. We agree that the CAM should be modified. Under the Commission's affiliate transactions rules,[8] when an affiliate provides substantially all of its services to regulated affiliates, the services shall be recorded by the regulated affiliates at the affiliate's fully distributed cost. Since the Bell Atlantic telephone companies receive substantially all of the supplies provided by NSI, we direct Bell Atlantic to change the terms of this affiliate transaction to fully distributed cost. For purposes of continuity and clarity, we require Bell Atlantic to include miscellaneous business supplies as an affiliate transaction instead of combining it with materials management. Bell Atlantic should list miscellaneous business supplies under Services and Supplies immediately after materials management.

III. ORDERING CLAUSE

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Section 64.903 of the Commission's Rules, 47 C.F.R. §64.903, that the revisions filed by the Bell Atlantic Operating Companies ARE ACCEPTED subject to the conditions noted in this Order.

11. IT IS FURTHER ORDERED, that the Bell Atlantic Operating Companies shall submit further revisions, as specified in this Order, in its next quarterly Cost Allocation Manual filing.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Bureau Chief, Operations
Common Carrier Bureau

[8] 47 C.F.R. §32.27.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 16, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMERY TELEPHONE COMPANY PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On September 4, 1992, the Amery Telephone Company (Amery) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. Amery requests an additional four months to complete the conversion of its end offices to equal access.

Amery states that it initially received a request for equal access conversion from MCI Telecommunications Corporation (MCI) in March 1988. Pursuant to Commission order, Amery is required to complete the equal access conversion of end offices equipped with stored program controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, (Report and Order), 100 FCC 2d 860 (1985). In May 1990, Amery filed a petition for waiver seeking a one and one-half year extension of the Commission's equal access implementation requirements stating that it was unable to complete its equal access conversion within three years due to equipment delivery delays. In January 1991, the Commission granted Amery's initial waiver request and Amery was required to complete its equal access conversion by September 1992. *See In the Matter of C, C & S Telco, Inc., et al.*, 6 FCC Rcd 547 (1991).

Amery now seeks an additional four months, from September 1992 until January 1993. Amery states that due to difficulties with its fiber optic facilities, it will not be able to complete the equal access conversion until January 1993. Amery states that the additional four months will afford it the time necessary to install the equipment, test it, and make adjustments. Amery states that it has notified all five of its interexchange carrier customers of the delays and that MCI has no objection to the brief extension.

Interested parties should file comments on the petition by **October 5, 1992,** and reply comments by **October 20, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MESSAGE CENTER BEEPERS, INC.
and HENRY M. ZACHS
d/b/a MESSAGE CENTER BEEPERS

and

METROMEDIA PAGING SERVICES, INC.

and

CONTACT COMMUNICATIONS, INC.,
Complainants,

v. File No. E-92-94

SOUTHERN NEW ENGLAND
TELEPHONE COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: September 9, 1992; Released: September 16, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 24, 1992, Message Center Beepers, Inc., Henry M. Zachs d/b/a Message Center Beepers, Metromedia Paging Services, Inc., and Contact Communications, Inc. (hereinafter "Complainants") filed the above-captioned formal complaint against Southern New England Telephone Company (hereinafter "Defendant"), alleging, among other things, that Complainants had been harmed by Defendant in the matter of interconnection standards for interstate and intrastate communications services utilized by Complainants, in violation of Commission rules and policies. On August 31, 1992, however, Complainants filed a motion requesting dismissal of the complaint, without prejudice, stating that the parties had resolved all disputes with respect to the matters encompassed in the complaint.

2. We are satisfied that withdrawal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditures of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Complainants' Motion to Dismiss Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITHOUT PREJUDICE, and the proceeding IS TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 11, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON WASHINGTON COUNTY RURAL TELEPHONE COOPERATION PETITION TO WAIVER OF SECTION 69.605(c)

On July 24, 1992, Washington County Rural Telephone Cooperation (WCRTC) filed a petition for waiver of the Commission's rule precluding companies from converting from settlement on a cost basis to settlement on an average schedules basis. *See* 47 C.F.R. § 69.605(c). WCRTC states that although it converted to cost in May 1991, it seeks a waiver to return to average schedule settlements.

According to WCRTC, its former manager decided to convert to settlement on a cost basis based on an estimate prepared by an outside consultant using 1989 data. WCRTC states that the consultant incorrectly classified two of the company's remote switching units as concentrators, thereby producing Universal Service Fund (USF) payments. WCRTC states that the decision to convert to cost was based largely on the expectation of receiving significant USF payments. WCRTC adds that as an average schedule company with more than 385 access lines WCRTC received no USF compensation.

WCRTC argues that the waiver would be in the public interest. WCRTC claims that by returning to average schedule settlements, the company will be spared the expense of performing cost studies and will not incur the higher costs associated with cost study administration. WCRTC also states that since it is a small company, its return to average schedule settlements would have a *de minimis* effect on the NECA pooling process.

Interested parties should file comments on this waiver by **October 13, 1992,** and reply comments by **October 28, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1990 M Street, N.W., Suite 640, Washington, D.C. 20036. Copies of the waiver can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS
SATELLITE CORPORATION File No. ISP-92-007

Request for Waiver of Section
25.131(j)(1) of the Commission's
Rules As It Applies to Services
Provided via the INTELSAT K satellite

MEMORANDUM OPINION AND ORDER

Adopted: September 4, 1992; Released: September 8, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On July 29, 1992, the Communications Satellite Corporation (Comsat) filed a Request for Waiver of Section 25.131(j)(1) of the Commission's Rules, 47 C.F.R. § 25.131(j)(1), to permit the unlicensed operation of standalone receive-only earth stations used to access encrypted, direct-to-user international services provided over the INTELSAT K satellite of the International Telecommunications Satellite Organization (INTELSAT). As discussed below, a partial waiver of the rule is granted.

II. BACKGROUND

2. Comsat filed a petition on February 20, 1992, seeking repeal of Section 25.131(j)(1), along with a request for interim waiver of that rule as it applied to receive-only earth stations accessing the INTELSAT K.[1] On July 23, 1992, the Common Carrier Bureau dismissed Comsat's waiver application on the ground that it was "not based on special circumstances which would make strict application of Section 25.131(j)(1) inconsistent with the purposes of the rule."[2] Comsat states it recognizes the Bureau's concerns regarding its February 20, 1992 waiver request, and therefore has resubmitted its request for a waiver, accompanied by a showing of the special circumstances which it believes warrants exception from Section 25.131(j)(1).

3. In support of its waiver request, Comsat states the technological characteristics of the INTELSAT K, and the services it was designed to accommodate, make possible a class of receive-only earth stations clearly distinguishable from the types of receive-only stations intended for individual licensing under Section 25.131(j)(1). Unlike any other satellite in the INTELSAT global system, the INTELSAT K was designed with special high-powered capabilities so as to permit the unprecedented downsizing of receive-only earth stations, enabling Comsat's customers to provide high-quality, encrypted international video and audio signals directly to user premises.[3]

4. Comsat states the INTELSAT K satellite will enable Comsat's customers to offer direct-to-user services utilizing receive-only earth stations half the size of existing antennas used with other INTELSAT satellites. INTELSAT space segment capacity affording this combination of power, coverage and signal quality is available exclusively on the INTELSAT K satellite.[4] For these reasons, the INTELSAT K also possesses features to create an entirely new market for Comsat international services dependent on the exceptionally small size of the earth stations that can access this high-powered satellite. However, Comsat states that the hardships associated with earth station licensing for the encrypted, direct-to-user services to be provided over the INTELSAT K will be "staggering," potentially involving many thousands of receive-only antennas. Comsat argues application of Section 25.131(j)(1) in these circumstances could negate the benefits for which INTELSAT K was developed.

5. Four parties filed comments in this proceeding.[5] The USIA supports Comsat's request, stating that licensing requirements for receive-only earth stations to access the INTELSAT K satellite will result in undue delays for broadcasters, and preclude American audiences from receiving news and information from other countries. In opposition, PanAmSat, HCG and PRIMESTAR state that Comsat has again failed to plead with specificity the facts and circumstances which make Section 25.131(j)(1) of the Rules inapplicable to receive-only earth stations communicating with INTELSAT K. They also argue that Comsat's request would result in a rule of general applicability, and therefore a Rule Making proceeding is the most appropriate avenue for addressing the concerns raised by Comsat's proposal. PanAmSat adds that the waiver request is contrary to the Communications Satellite Act of 1962 (Satellite Act) since Comsat's customers intend to use the INTELSAT K satellite primarily for conventional services, not direct-to-user services, which services have traditionally been provided by "satellite terminal stations," which are required to be licensed under that Act. Comsat filed reply comments.[6]

III. DISCUSSION

6. *Legal Standard.* The Commission has the authority to waive its rules if there is "good cause" to do so. *See* 47 C.F.R. §1.3. In *WAIT Radio v. F.C.C.*,[7] the court found waivers to be an important part of the agency Rule Making process since they allow agencies to adopt general rules, without addressing every possible contingency covered by the rule. While waivers are a necessary safety valve for rules of general applicability, the court stated that an agency's obligation to give meaningful consideration to waiver requests does not contemplate that the agency must or should tolerate evisceration of a rule by waivers. A waiver must not undermine the underlying policy of the rule, while at the same time taking into consideration any factors of hardship, equity or more effective implementation of overall policy. The function of a waiver is not to change the general standard of the rule, since this is a matter for which the opportunity for general comment is a prerequisite under the Administrative Procedure Act, but instead to justify an *ad hoc* exception to that standard in a particular case.[8] Further, a waiver must identify and articulate reasonable standards that are predictable, work-

able, and not susceptible to discriminatory application.[9] As demonstrated below, the Bureau concludes that Comsat's waiver request meets these legal requirements.

7. *History of Section 25.131(j)(1).* The Commission has had a general policy requiring licensing of international receive-only earth stations since the early 1970s.[10] At that time, international earth stations accessing the INTELSAT global system consisted primarily of very large "gateway" facilities interconnected with common carrier networks. With advances in satellite technology and a maturing market, the Commission decided in 1979 to deregulate domestic receive-only earth stations, but continued to require that INTELSAT receive-only earth stations be licensed.[11] In its 1986 *Equatorial* decision, however, the Commission created an exception to that requirement for INTELNET I international earth stations, which are small user-owned earth stations that access the INTELSAT system for one-way data reception.[12] This exception was codified in 1991, when the Commission adopted Section 25.131(j)(1) of the Rules as part of a comprehensive codification of filing procedures for satellite communications services.[13]

8. The *Equatorial* decision held that licensing of INTELNET I receive-only earth stations is not mandated by the Satellite Act because such stations are not "satellite terminal stations"[14] within the meaning of Section 201(c)(7) of that Act, 47 U.S.C. § 721(c)(7), which requires that "satellite terminal earth stations" be licensed only to Comsat and/or communications common carriers.[15] The Commission concluded that these earth stations were not "satellite terminal stations," and did not require licensing because: (1) "[u]nlike most other INTELSAT offerings, INTELNET I service involves direct-to-user transmission;" (2) INTELNET I receive-only earth stations are "stand-alone device[s]" that are not connected "physically or 'operationally'" to the terrestrial communications network; (3) receive-only earth stations are "passive," so they do not raise the regulatory concerns with respect to interference and spectrum conservation that Title III licensing is designed to control; (4) Equatorial's signals were encrypted, so there was "small likelihood of unauthorized reception;" and (5) deregulation of INTELNET I earth stations would pose no threat to the technical integrity of the INTELSAT system.[16] The Commission therefore decided that INTELNET I earth stations did not require licensing.[17]

9. *Comsat Waiver Request.* The facts and circumstances described by Comsat as the basis for its waiver request are very similar to the reasons given by the Commission in *Equatorial* for not licensing INTELNET I receive-only earth stations. Indeed, the only difference between the two cases is that this situation involves video and audio, whereas *Equatorial* involved data. Here, as in *Equatorial*, the service to be provided, "unlike most INTELSAT offerings, . . . involves direct-to-user transmissions." Moreover, the earth stations involved are "stand-alone," "passive" devices that are not physically or operationally connected to the terrestrial communications network[18] and do not raise concerns with respect to interference and spectrum conservation that licensing was designed to control. Once again, as in *Equatorial*, the signals involved are coded, so there is "small likelihood of unauthorized reception." And finally, here, as in *Equatorial*, there is no threat to the technical integrity of the INTELSAT system, so not licensing such stations would not be inconsistent with U.S. international obligations.[19]

10. Thus, the Bureau can, consistent with the Commission's *Equatorial* decision, grant a waiver applicable to receive-only earth stations accessing the INTELSAT K satellite, to the extent that such reception: (1) involves direct-to-user applications; (2) involves stand-alone, passive devices not an integral part of any common carrier network; (3) involves reception of encrypted video and audio transmissions; and (4) does not infringe on any obligations owed to INTELSAT. In short, the Bureau can grant this waiver without undercutting the general applicability of Section 25.131(j)(1) in other circumstances.

11. *Public Interest Considerations.* Having concluded that there are no legal obstacles to the Bureau granting Comsat's waiver request, we now address whether the public interest would be served by a grant. As shown below, we find that requiring the licensing of receive-only earth stations for the direct-to-user services to be provided over the INTELSAT K could negate the benefits of these services. The INTELSAT K's formal entry into service was scheduled for August 15, 1992, and Comsat already has leased eight of the satellite's sixteen transponders for inbound international service on a long-term basis.[20] Comsat's transponder customers are prepared to deliver direct-to-user services to the public as soon as possible. Comsat projects the potential involvement of thousands of small receive-only earth stations for these services. Imposing a licensing requirement for these earth stations would be burdensome, time-consuming and confusing to U.S. consumers who have been free from such a requirement on domestic receive-only earth stations since 1979. This, in turn, could impede introduction of a service that will benefit consumers. Such a result would not be desirable, especially when licensing these earth stations does not otherwise provide any discernible public interest benefit. Finally, in contrast to the licensing of systems having a finite universe of antennas, licensing here would place an inordinate burden upon the Commission to review the thousands of license applications projected. Thus, the public interest would be served by waiving the licensing requirement of Section 25.131(j)(1) of the Rules as it applies to the receive-only earth stations described herein.

12. In summary, the Bureau finds that Comsat has justified grant of a limited waiver of the Section 25.131(j)(1) licensing requirements. The limited waiver authorized here does not undermine or eviscerate the general rule; indeed, Comsat has provided specific facts and circumstances which demonstrate the hardship that would result from the strict application of Section 25.131(j)(1) in this case.

IV. CONCLUSION & ORDERING CLAUSE

13. The Bureau finds that Comsat has justified a waiver of the Section 25.131(j)(1) licensing requirements for receive-only earth stations accessing the INTELSAT K satellite, consistent with the guidelines established in *Equatorial*, and that Comsat has shown that a waiver of the rule in this case serves the public interest.

14. Accordingly, IT IS ORDERED that Comsat's petition for a partial waiver of Section 25.131(j)(1) of the Commission's Rules IS GRANTED, and the licensing requirement is waived for receive-only earth stations accessing the INTELSAT K satellite, to the extent such reception: (1) involves stand-alone, passive devices not an integral part of any common carrier network; (2) involves

direct-to-user applications; (3) involves reception of encrypted video and audio transmissions; and (4) does not infringe on any obligations owed to INTELSAT.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Repeal and, in the Interim, for Waiver (February 20, 1992). This petition was the subject of two public notices, one (RM-7931) dealing with Comsat's request for repeal of the rule and the other (File No. ISP-92-004) dealing with its request for waiver. Comsat's request to repeal the rule is still pending and will be acted on in a separate proceeding.

[2] Communications Satellite Corporation, DA 92-955 (released July 23, 1992), ¶ 6.

[3] The INTELSAT K satellite was successfully launched on June 9, 1992. It is the highest-powered satellite (and the only completely Ku-band satellite) in the INTELSAT system. The INTELSAT K provides transmit and receive coverage of Europe (as far east as Moscow) and North America (as far west as Houston) in addition to receive-only coverage in Latin America. In the eastern half of the United States, the INTELSAT K provides a 50 decibel (dB) or better signal-to-noise (S/N) ratio into antennas as small as 1.8 meters in diameter, and 46-50 dB S/N into antennas as small as 1.2 meters. Signals of only slightly less quality can be provided into antennas as small as 0.65 meters in diameter -- about 26 inches.

[4] By way of comparison, in order to achieve 50 dB S/N performance from the Ku-band transponders on the INTELSAT VI and INTELSAT VA series satellites, it would be necessary to use antennas between 2.4 and 3.5 meters in diameter. Moreover, the coverage areas on the INTELSAT VA and VI are much smaller than the comparable coverage areas on the INTELSAT K.

[5] A supporting comment was filed by the United States Information Agency (USIA). Opposing comments were filed by Pan American Satellite (PanAmSat), Hughes Communications Galaxy, Inc. (HCG) and PRIMESTAR PARTNERS, L.P. (PRIMESTAR).

[6] In response to Comsat's reply comments, PanAmSat filed a supplement to its opposition. PanAmSat's supplement recognizes that Comsat's waiver request is limited to small receive-only earth stations used for reception of direct-to-user services, but PanAmSat maintains that Comsat's request is still too broad to meet the Commission's waiver standard.

[7] *WAIT Radio v. F.C.C.*, 418 F.2d 1153 (D.C. Cir. 1969).

[8] *Maritel*, 3 FCC Rcd 4690, 4692 (1988).

[9] *Northeast Cellular Telephone Company, L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[10] *See* Deregulation of Domestic Receive-Only Satellite Earth Stations, 74 FCC 2d 205, 218 (1979) (*Domestic Receive-Only*).

[11] *Id.*

[12] Deregulation of Receive-Only Satellite Earth Stations Operating with the INTELSAT Global Communications Satellite System, FCC 86-214 (released May 19, 1986) (*Equatorial*).

[13] Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services, 6 FCC Rcd 2806 (1991) (*Part 25 Order*). In the *Part 25 Order* proceeding, the Commission was asked by one of nearly eighty commenting parties to deregulate all international receive-only earth stations as well. The Commission declined this invitation because the comments on the record before it were "insufficient to decide whether and under what conditions current licensing requirements may be relaxed consistent with international obligations." *Part 25 Order* at 2807-08. The Commission did, however, specifically reference its *Equatorial* ruling in the *Part 25 Order*, and Section 25.131(j) as adopted exempted INTELNET I receive-only earth stations from the general licensing requirements. *Id.* at 2808 n. 32. Finally, the Commission indicated in the *Part 25 Order* that "further review of this issue may be desirable in a separate proceeding." *Id.* at 2807-08.

[14] The Commission has defined satellite terminal earth stations, in accordance with Section 103(2) of the Satellite Act, to be those earth stations operationally connected with, and an integral part of, one or more of the terrestrial communication systems of U.S. common carriers. *See Licensing Under Title III of Private Transmit/Receive Earth Stations Operating with the INTELSAT Global Communications Satellite System*, 3 FCC Rcd 1585, 1587 (1988)(*Reuters*), *aff'd sub. nom TRT Telecommunications Corp. v. F.C.C.*, 876 F.2d 134 (D.C. Cir. 1989).

[15] *Equatorial*, FCC 86-214 at ¶¶ 13-16.

[16] *Id.* at ¶¶ 12-18.

[17] *Id.* at ¶ 16.

[18] By definition, this waiver does not apply to receive-only earth stations which are "satellite terminal earth stations" under the Satellite Act. This waiver applies only to stand-alone receive-only earth stations used with the INTELSAT K satellite, which are comparable to the INTELNET I stations already found not to be satellite terminal earth stations. Therefore, contrary to PanAmSat's argument, a waiver here will not violate our obligations under the Satellite Act to restrict licensing of satellite terminal earth stations to Comsat and common carriers.

[19] INTELSAT has no mandatory performance requirements for video receive-only earth stations. Indeed, it is even less stringent with regard to these earth stations than with regard to INTELNET I earth stations, which are required to meet Standard G specifications. *See* Equatorial at n.27. Moreover, INTELSAT has no requirement that receive-only earth stations be licensed by member administrations. Its sole concern in this regard is with transmissions, since only they present the potential for harmful interference. Thus, Commission non-licensing here with respect to video and audio receive-only stations would be fully consistent with U.S. obligations to INTELSAT. *See Part 25 Order* at 2708.

[20] Of Comsat's four existing customers for INTELSAT K capacity, one in particular has business plans that involve the transmission of European video and audio programming on a subscription basis to customers in the United States. The service that Comsat's customer intends to provide consists of international video, news and information in a variety of languages. Users will be able to obtain this service only by using decoders available by subscription. The earth stations will be activated by commands originated at the transmitting control center, with unique commands for each receive-only antenna depending on user selection. Other existing or future Comsat customers could potentially provide the same type of direct-to-user service.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CICI, INC.	File Nos. CSG-92-042-(8)-AL
IDB	CSG-92-043-(21)-AL
COMMUNICATIONS	EID-680
CORPORATION	

AND

SOUTHWEST COMMUNICATIONS, INC

Applications for Consent to the Assignment of Title III Earth Station Facilities and Microwave Facilities.

AND

SOUTHWEST	File No. I-T-C-92-085
COMMUNICATIONS, INC.	

Application for Blanket Authority, Pursuant to Section 214 of the Communications Act, as Amended, to Establish Channels of Communication Between the U.S. and INTELSAT Atlantic and Pacific Ocean Region Satellites for Provision of INTELSAT Business Services and International Television Service.

MEMORANDUM OPINION, ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 2, 1992; Released: September 17, 1992

By the Chief, International Facilities Division:

1. We have under consideration the above-captioned applications filed by CICI, Inc. (CICI), IDB Communications Corporation (IDB-C) and Southwest Communications, Inc. (SCI).[1] IDB-C and CICI (Assignors) request authority to assign their respective Title III authorizations for satellite earth stations and microwave systems to SCI (Assignee)[2], pursuant to Section 310 (d) of the Communications Act of 1934 (the Act), as amended, 47 U.S.C. §310 (d). We must also consider the application pursuant to Section 212 of the Act, as amended, 47 U.S.C. §212, and Sections 62.1(a) and 62.11 of the Commission's Rules, 47 C.F.R. §§62.1(a) and 62.11, for authorization of Dennis Feely to serve as an officer of both IDB and SCI. In addition, SCI requests authority, pursuant to Section 214 of the Act, as amended, 47 U.S.C. §214, to establish channels of communication between the United States and INTELSAT Atlantic and Pacific Ocean Region satellites to provide INTELSAT Business Service (IBS) and International Television Services (ITS) via existing or future earth stations.[3] We placed the three applications on public notice on February 5, 1992, and received no comments. We will first consider the IDB-C and CICI assignment applications and, then, the SCI Section 214 application.

2. IDB-C and CICI are wholly owned subsidiaries of IDB Communications Group, Inc. (IDB), a dominant U.S. international common carrier. IDB-C holds international and domestic satellite earth station and microwave station licenses. CICI holds international satellite earth station and microwave station licenses. The applicants' earth stations provide video, data, and voice services.

3. Under Section 310(d), an application to transfer, assign, or dispose of a station license shall be disposed of as if the proposed transferee or assignee were making an initial application for a station license, pursuant to Section 308. We must determine whether SCI, as the Assignee, satisfies the minimum requirements for holding a license. Accordingly, it is essential that a licensee retain exclusive responsibility for the operation and control of its facilities at all times.[4]

4. The Assignors state that IDB needs to make itself available to additional equity financing from existing or future shareholders. As the parent company of Title III licensees, IDB is subject to Section 310(b)(4)'s statutory benchmarks for alien ownership.[5] Given that IDB is a publicly traded corporation with an average daily trading volume of 1% and alien ownership of 16%, IDB alleges that it is increasingly difficult to monitor and control the public trading of its shares by aliens.[6] Thus, in order to eliminate any potential Section 310 (b)(4) concerns arising from additional equity financing, the Assignors propose to assign their Title III earth station and microwave licenses to SCI. The Assignors state that the proposed assignments and contractual arrangements are consistent with Commission policy and precedent.[7]

5. Consideration of the proposed assignments from IDB-C and CICI to SCI requires an analysis of the circumstances surrounding the transaction to determine where actual control of the facilities will rest.[8] In asserting that SCI will retain exclusive responsibility for the facilities, the Assignors point out that SCI was established to be the assignee of existing licenses and to control, operate, and maintain the systems under a long term (10 year) contract with CICI and IDB.[9] CICI and IDB shall retain ownership of their respective systems. SCI will be an authorized, independent common carrier providing IBS and ITS services; it will also have its own separate, independent corporate business and will have no foreign owners, officers or directors.[10] Further, neither IDB nor the Assignors will have an ownership interest in SCI. Nor will SCI have any ownership interest in IDB or CICI.[11]

6. The contracts state that SCI will operate as a for-profit enterprise that may solicit business opportunities in addition to those of IDB and CICI. According to the contracts, SCI will be responsible for monthly lease payments for office, operations, and storage space provided by IDB and CICI. Further, the contracts provide that SCI shall be responsible for monthly lease payments on the systems to IDB and CICI. Similarly, both IDB and CICI will remit payments of monthly operator fees to SCI. These factors further indicate that SCI will maintain exclusive control of system operations. The contracts provide that monies derived from the operation of the facilities will be received by SCI. In addition, SCI shall have control over all personnel decisions relating to its own employees.[12] Based upon the provisions of the contracts, SCI appears to have

unfettered use of the facilities and equipment and responsibility for day to day operation and control of the facilities.

7. Therefore, upon review of the totality of the circumstances described above, we have no reason to find that SCI will have other than exclusive control of, and responsibility for, the earth stations and microwave systems. Accordingly, we find that the applications satisfy the standards set forth in *Intermountain Microwave*.[13]

8. Section 212 of the Act prohibits persons from holding the position of officer or director of more than one carrier subject to the Act unless authorized by the Commission upon a showing that neither public nor private interests will be adversely affected by the interlock. In determining whether public or private interests will be adversely affected, we consider a number of factors, including but not limited to the potential for anticompetitive conduct, a possible diminution in the independence of each carrier involved, or the possibility of conflicts of interest on the part of common directors or officers in violation of the fiduciary duties imposed upon persons occupying those positions.[14]

9. Both IDB and SCI are common carriers subject to the jurisdiction of the Commission. Dennis Feely does not maintain a controlling ownership interest in either IDB or SCI. As the Executive Vice President of IDB and the proposed President of SCI, Mr. Feely seeks authorization to serve as an interlocking officer of both companies. Mr. Feely's duties as President of SCI include general charge of the business affairs and property, subject to the direction of the Board of Directors.[15] As Executive Vice President of IDB, Mr. Feely is responsible for administration of business affairs as assigned to him by the chief executive officer, the president, the board, or as provided for in the bylaws.[16]

10. The record indicates that neither Mr. Feely's limited ownership interests in IDB and SCI nor his position as an officer of IDB confer upon him sufficient independent control over policy decisions so that he may exert influence on behalf of IDB over the policies of SCI. The record further reveals that Mr. Feely, as President of SCI, is but one of four SCI officers, all of whom are subject to the ultimate control of SCI's Board of Directors. Because Mr. Feely's interests do not indicate a potential to control either IDB or SCI we do not find a conflict of interest.[17] Moreover, based on our review of the record, we do not believe the proposed arrangement would enable those companies to engage in anticompetitive activity or otherwise diminish the independence of IDB or SCI.

11. Upon consideration of the facts and circumstances presented by this application, we find that Mr. Feely has made a satisfactory showing as required by law that public and private interests will not be adversely affected by granting the requested authorization.

12. We now turn to SCI's request for blanket Section 214 authority to provide IBS and ITS services as we have granted to other carriers.[18] A grant of blanket authority here would be consistent with the action that we took in those decisions and in the public interest. SCI has the requisite qualifications to provide IBS and ITS services to overseas points where such services have been introduced.

13. Accordingly, IT IS ORDERED that applications, File Nos. CSG-92-042-(8)-AL and CSG-92-043-(21)-AL ARE GRANTED and IDB Communications Corporation and CICI, Inc. are authorized to assign their respective Title III earth station licenses to Southwest Communications, Inc., as listed in Attachments 1 and 2.

14. IT IS FURTHER ORDERED that the application of Dennis Feely, EID-680, IS GRANTED.

15. IT IS CERTIFIED, pursuant to 47 U.S.C. §214, that the present and future public convenience and necessity require the provision by Southwest Communications, Inc. of earth segment capacity for IBS and ITS at earth stations that are now or may be licensed to it in the future.

16. IT IS FURTHER ORDERED that application File No. I-T-C-92-085 is GRANTED, and Southwest Communications, Inc. is authorized to establish channels of communications between the United States earth stations and appropriate INTELSAT Atlantic and Pacific Ocean Region satellites for the provision of IBS and related digital video services and ITS service between the United States and those countries that are now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or ITS services; provided, however, that this blanket Section 214 authorization is without commitment as to the Commission's action on any IBS earth station Title III applications that the applicant may file in the future.

17. IT IS FURTHER ORDERED that the Section 214 authorization granted herein shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

18. IT IS FURTHER ORDERED that the tariffs of Southwest Communications, Inc. must state that its customers may not resell international private lines leased from Southwest Communications, Inc. or connect them to the public switched network for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd. 559 (1991), *petitions for reconsideration pending*.

19. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of any necessary operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

20. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

21. IT IS FURTHER ORDERED that Southwest Communications, Inc. shall file tariff provisions pursuant to Section 203 of the Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

22. IT IS FURTHER ORDERED that Southwest Communications, Inc. shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

23. IT IS FURTHER ORDERED that Southwest Communications, Inc., which is regulated as a nondominant carrier, shall file semi-annual reports of circuit additions or deletions to certificated points, pursuant to Section 63.10 of our Rules, 47 C.F.R. §63.10.

24. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Applications for review under Section 1.115 or petitions for reconsideration under 1.106 of the Commission's Rules may be filed within 30 days from the public notice of this order (see Section 1.4 (b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT 1

CICI, INC.: INTERNATIONAL TITLE III EARTH STATION AUTHORIZED ASSIGNMENTS*

Call Sign	Location	File Number
1. KA-63	Niles Canyon, CA	CSG-85-004-P/L CSG-90-084-ML
2. KA-76	Niles Canyon, CA	CSG-86-017-P/L CSG-90-042-ML
3. KA-249	Santa Paula, CA	CSG-87-013-P/L CSG-89-129-ML
4. KA-227	New York Teleport (Staten Island, NY)	CSG-87-027-P/L CSG-90-085-ML
5. KA-65	Washington, DC (L'Enfant Plaza)	CSG-84-035-P/L (CSG-86-060-ML)
6. WA-36	New York Teleport (Staten Island, N.Y.)	CSG-83-034-P/L CSG-85-017-P/L
7. KA-300	Fremont, CA	CSG-91-054-P/L

*As per applicant's request, Call Sign KA-42 was deleted from this list.

ATTACHMENT 2

IDB COMMUNICATIONS CORPORATION: INTERNATIONAL TITLE III EARTH STATION AUTHORIZED ASSIGNMENTS*

Call Sign	Location	File Number
1. KA-219	Culver City, CA	CSG-87-036-P/L(A)
2. KA-222	Culver City, CA	CSG-87-037-P/L
3. KA-224	Culver City, CA	CSG-88-073-P/L
4.	Culver City, CA	CSG-89-061-P/L
5. KA-228	Staten Island, NY	CSG-87-025-P/L
6. KA-223	Staten Island, NY	CSG-87-034-P/L
7. KA-234	Staten Island, NY	CSG-88-009-P/L CSG-89-115-ML CSG-92-002-ML
8. KA-235	Staten Island, NY	CSG-88-010-P/L CSG-89-116-ML CSG-91-005-ML
9. WA-37	Manhattan, NY	CSG-84-004-P/L
10. KA-242	Arlington, VA	CSG-87-035-P/L
11. KA-67	Ballmawr, NJ	CSG-85-010-P/L
12. KA-209	College Park, GA	CSG-87-001-P/L
13.	Vallejo, CA	CSG-88-089-P/L
14. KA-77	Washington, DC	CSG-85-054-P/L
15. KA-97	Vallejo, CA	CSG-86-065-P/L
16. KA-98	Vallejo, CA	CSG-86-066-P/L
17. KA-230	New York, NY	CSG-84-027-P/L (CSG-86-015-ML) (CSG-88-088-ML)
18. KA-285	Staten Island, NY	CSG-91-044-P/L CSG-91-044-P/L(A)
19. KA-286	Staten Island, NY	CSG-89-074-P/L
20. KA-298	Culver City, CA	CSG-91-048-P/L
21. KA-308	Staten Island, NY	CSG-91-144-P/L

* As per applicant's request, File No. CSG-88-011-ML was deleted from this list.

FOOTNOTES

[1] On July 13, 1992, IDB-C and CICI filed an amendment to their applications.

[2] *See* Attachments 1 and 2 for complete list of IDB-C and CICI authorizations being transferred to SCI.

[3] We expect that appropriate authorizations will be sought for any future Title III facilities.

[4] *See Intermountain Microwave*, 24 RR 983 (1963), in which the Commission defined the normal indicia of such operation and control: "The normal minimum incidents of such interest include the unfettered use of all facilities and equipment used in connection therewith; day to day operation and control; determination of and the carrying out of policy decisions, including the preparation and filing of applications with this Commission; employment, supervision, and dismissal of personnel; payment of financial obligations including expenses arising out of operation; and the receipt of monies and profits derived from the operation of microwave facilities".

[5] Section 310 (b)(4) provides, in pertinent part, that no common carrier fixed radio station license shall be granted to or held by "any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country if the Commission finds that the public interest will be served by the refusal or revocation of such license". 47 U.S.C. §310(b)(4).

[6] *See* Applications, Attachment 2, p.3.

[7] *In the Matter of Satellite Transmission and Reception Specialist Company, and Transmission Operator Provided Systems, Inc.*, CSG-91-107-AL. Application granted by letter dated June 17, 1991, from George S. Li, Chief International Facilities Division, Common Carrier Bureau.

[8] *See Advanced Business Communications, Inc.*, 101 FCC 2d 516, 541 (1985); *Metromedia, Inc.*, 98 FCC 2d 300, 305 (1984); *Powel Crosley, Jr.*, 11 FCC 2, 20 (1945) ("A realistic definition of the word 'control' includes any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue.").

[9] Pursuant to discussion with IDB's legal counsel, staff was informed that IDB-C is to be dissolved and IDB will act in its stead.

[10] SCI's Certificate of Incorporation prohibits foreign ownership.

[11] We note that the individual shareholders of SCI have ownership interests in IDB. At present, SCI's shareholders in the aggregate account for less than 30% of the ownership of IDB. Moreover, this ownership percentage is likely to decrease proportionately to IDB's acquisition of additional equity financing. We are satisfied that this level of cross-ownership does not enable IDB to exercise control over SCI.

[12] *See* Amendment.

[13] *See supra* note 3.

[14] *In re Application of Walter S. Gifford*, 2 FCC 741 (1935). *See also In re Application of James A. Dwyer*, 2 FCC Rcd. 4278 (1987)(granted applicant authority to serve as both President and Director of two parents of wholly-owned carriers providing radio common carrier services).

[15] *See* Bylaws of SCI at page 10.

[16] *See* Bylaws of IDB at page 11.

[17] We note that the remaining officers and directors of SCI are apparently independent of IDB.

[18] *See generally International Competitive Carrier Policies*, 102 FCC 2d 812, 844 (1985). For IBS services, *see Vitalink International Communications, Inc.*, Mimeo No. 687 (released November 7, 1984). *See also Communications Satellite Corporation*, Mimeo No. 6564 (released September 14, 1984), and *American Telephone and Telegraph Co., et. al.*, (File Nos. I-T-C-85-035, et. al.), Mimeo No. 3220 (released March 18, 1985); for ITS, *see AT&T et. al.*, 18 FCC 2d 402 (1969), and *ITTWC, et. al.*, 76 FCC 2d 26 (1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJG MARITEL CORP — File No. I-T-D-92-003

Application for authority to close VHF-FM public coast station WHG-964, North Huntington, Pennsylvania.

Application for authority to close VHF-FM public coast station KLU-836, Freedom, Pennsylvania. — File No. I-T-D-92-004

ORDER AND AUTHORIZATION

Adopted: September 2, 1992; Released: September 17, 1992

By the Chief, International Facilities Division:

1. The above-captioned applications filed on May 28, 1992 by WJG Maritel Corp. (WJG), request authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF-FM public coast stations WHG-964, North Huntington, Pennsylvania and KLU-836, Freedom, Pennsylvania. Station WHG-964 serves the North Huntington area along the Allegheny River near Pittsburgh. Station KLU-836 serves the Freedom area along the Ohio river near Pittsburgh. The applications were placed on public notice on June 3, 1992. No comments were received.

2. The basis statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application to close both stations, WJG states that traffic via these stations has declined significantly in the recent past. In the first quarter of 1992, each station handled less than 20 messages (incoming and outgoing calls). After these two stations are discontinued, incoming calls for these two sites will be referred to Ameritech Mobile Services, Inc. which operates KGW-301 Mingo Junction, Ohio. The commercial vessels in the area have been using cellular, AMTS and their own private radio systems for primary and secondary means of voice communications. Further, the U.S. Coast Guard maintains safety and distress communications services throughout the entire coverage area of applicant's two sites.

4. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversley affected by the discontinuance of service via stations WHG-964 and KLU-836.

5. Accordingly, IT IS ORDERED that applications File Nos. I-T-D-92-003 and I-T-D-92-004 ARE GRANTED, and WJG is authorized to discontinue service via its public coast stations WHG-964 and KLU-836.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.114 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790 at 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of Benito Rish

Licensee of Radio Station
WREM(AM), Monticello, ME

for a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: August 28, 1992; Released: September 16, 1992

By the Commission: Commissioners Duggan and Quello concurring and issuing a joint statement.

1. The Commission has under consideration (1) a $10,000 Notice of Apparent Liability (NAL) issued May 17, 1991,[1] to Benito Rish, licensee of Station WREM(AM), Monticello, Maine; and (2) responses to the NAL submitted by Rish and by ARK Communications, Inc., the management organization for the station, dated June 10, 1991, and July 23, 1991, respectively.

2. The NAL was issued for apparent violation of 47 U.S.C. § 310(d), which prohibits the transfer of control of any broadcast station without prior Commission approval,[2] and 47 U.S.C. § 73.3613, which requires the timely filing of certain documents pertaining to station control.[3] These apparent violations were discovered during an inspection of WREM(AM) on April 3, 1989, by the FCC's Field Operations Bureau, which found ARK Communications, Inc. operating the station pursuant to a lease which had not been filed with the Commission. In response to Commission inquiries, the licensee, by letters dated September 29, 1989, and May 22, 1990, insisted that he maintained full control of the station under the lease agreement with ARK. The facts revealed in these letters, however, suggested otherwise. Specifically, the facts indicated that Rish was simply the landlord who contacted ARK's president only to collect the fixed rental payments, who seldom communicated with any station personnel or "interfered" with station business, and who left ARK to pay station bills and to enjoy profits, if any, after payment of expenses. Accordingly, citing *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981), *WWIZ, Inc.*, 36 FCC 561, 582-83 (1964) (violation found where management compensated from station profits and responsible for payment of station bills), and other case precedent articulating guidelines for determining control under Section 310(d) of the Communications Act, the Commission found that Rish had apparently violated the Act and related Commission rules from November 22, 1987 (the beginning of the first lease term with ARK), to May 1, 1991, warranting a forfeiture of $10,000.

3. In his June 10, 1991, response to the NAL, Rish argues that further oversight of ARK Communications, Inc., would have been superfluous and was completely unnecessary under the circumstances. He explains that he had met with ARK principals, discussed and approved the religious format broadcast on the station, and knew and trusted the individuals involved. He states that he has considered ARK's president to be his "alter-ego" and has received from him reports on all station matters. Rish expresses his belief that the WREM employees have been excellent and hard-working and that the WREM programming has been beneficial to and appreciated by the community being served. He argues that "control" is a matter of "degree," and its exercise with respect to such a small station as WREM should be evaluated on a different scale from what would be appropriate for a larger station.

4. ARK supplements Rish's response by stating that, while the Rish-ARK relationship as documented in the form of a lease agreement may appear to transfer control, that conclusion is incorrect in fact and substance. The licensee's primary mistake, in ARK's opinion, was his failure to document the existence of a management reporting system. ARK alleges that such a document, if properly drafted, would have demonstrated a permissible delegation of control similar to that implemented by other absentee station owners. ARK submits that Rish's answers to Commission inquiries "incorrectly described the relationship" between ARK and Rish and thus "unintentionally added to the perception that he is perpetuating a violation condition."

5. Section 310(d) of the Communications Act does not allow a licensee to transfer control of a broadcast station without prior Commission approval. The Commission has long considered responsibility in the areas of programming, personnel, and finances to signal where control is vested. Documentation of arrangements which allow other parties to participate in these functions can provide evidence of the actual operation of the station, but the Commission will look beyond the documents to find the facts. *See, e.g., Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981); *see also Letter to Roy R. Russo*, 5 FCC Rcd 7586 (MMB 1990). In the case of WREM, both the documents and the facts provided by the parties support a finding that Rish, the licensee, abdicated control of the station to ARK.

6. We do not find in the pleadings any reason to reverse our conclusion reached in the NAL. Rish states that ARK reports everything to him, but neither Rish nor ARK offers any specifics about these reports or their frequency. Considered in conjunction with Rish's initial statement that he is "not very often" in contact with station personnel (presumably including ARK principals), this unsubstantiated and non-specific claim that ARK reports to Rish does not rebut the substantial evidence that a violation has occurred. Moreover, ARK's response to the NAL, which appears to contend that the licensee misunderstood the relationship between himself and ARK, hardly suggests the kind of conscious and continuing control over station affairs that we require of licensees.

7. As mitigating circumstances, Rish maintains that there was no intent to deceive the Commission or to violate the law. It has long been the Commission's position that deliberate intent to violate the law or to evade detection is not an essential element of the violations here at issue. *See, e.g., Cate Communications Corp.*, 60 RR 2d 1386 (1986), and the cases cited therein. Moreover, while intent is a relevant consideration in assessing the amount of a forfeiture penalty, it is generally an exacerbating factor where present. The mere absence of an intent to violate Commission rules or requirements, without a showing of

good faith attempts to comply, is not mitigative. *See Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

8. Rish further claims that assessment of the full forfeiture amount of $10,000 would force the station off the air. Rish has, however, failed to submit a profit and loss statement prepared under generally accepted accounting principles as required (see paragraph I(B) of the Attachment to the NAL) to support the claim of inability to pay.[4] We therefore deny the request to reduce or rescind the forfeiture.

9. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, that Benito Rish, licensee of Radio Station WREM(AM), Monticello, Maine, FORFEIT to the United States the sum of ten thousand dollars ($10,000) for violations of Section 310(d) of the Communications Act and Section 73.3613 of the Commission's rules.[5] Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See By Direction Letter*, 6 FCC Rcd 2628 (1991).

[2] Section 310(d) of the Communications Act states, in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

[3] Commission rules require a licensee to file with the Commission, within 30 days of their execution, "contracts, instruments or documents relating to the present or future ownership or control of the licensee," including options; and "contracts relating to the utilization in a management capacity of any person other than an officer, director, or regular employee of the licensee," as well as "station management contracts with any persons, whether or not officers, directors, or regular employees, which provide for both a percentage of profits and a sharing of losses; or any similar agreements." 47 C.F.R. § 73.3613(b) and (c).

[4] ARK's response to the NAL included an attempt to document WREM's financial condition. However, ARK's submission was totally inadequate and, at any rate, was ARK's statement, not Rish's. On January 16, 1992, Rish submitted a simple statement that WREM was financially insolvent, and that declining financial conditions had resulted in ARK's complete departure from the station. Rish provided no documentation of the station's assertedly insolvent condition and, to the best of our knowledge, the station continues to broadcast.

[5] Subsequent to issuance of the NAL before us, the Commission adopted guidelines governing the base forfeiture amounts for various classes of violations. *See Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, FCC 92-212 (June 4, 1992). Under the criteria established in the *Policy Statement*, the base forfeiture for an unauthorized substantial transfer of control is $20,000, with upward adjustments for exacerbating elements (such as the repeated or continuous nature of the violation). The substantial nature of this forfeiture amount reflects the Commission's longstanding view that unauthorized transfers of control are extremely serious violations of fundamental Commission and statutory requirements. Indeed, in egregious cases (usually involving deliberate attempts to deceive the Commission), unauthorized transfers of control have warranted license revocation or nonrenewal. Here, where there has been no attempt to deceive the Commission about control of WREM, a substantial monetary forfeiture is nonetheless warranted.

CONCURRING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN AND COMMISSIONER JAMES H. QUELLO

In the Matter of Liability of Benito Rish, Licensee of Radio Station WREM(AM), Monticello, Maine, for a Forfeiture

We will not dispute this decision because we do not want to waver in enforcing the Commission's prohibition on premature transfers of control. However, the fact that WREM is apparently under contract to be sold for $2,000 ought to tell us something about the licensee's ability to pay a $10,000 forfeiture. We fail to see how assessing a fine that is five times the station's value tempers justice with mercy---or with realism, for that matter.[1]

FOOTNOTE TO STATEMENT

[1] *See* Concurring Statement of Commissioner Ervin S. Duggan (released August 14, 1992); Dissenting Statement of Commissioner James H. Quello, *In the Matter of Standards for Assessing Forfeitures*, FCC 92-212 (released June 14, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-429

In re Applications of

EUGENE WALTON	File no. BPH-870904MS
HENDERSON BROADCASTING OF MEMPHIS, INC.	File No. BPH-870908MJ
DAVID J. BOTT AND CARESE C. BOTT, JOINT TENANTS	File No. BPH-870908MN
PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870908MS
OMNI BROADCASTING CORP.	File No. BPH-870908MV
GERMANTOWN BROADCASTING CORP.	File No. BPH-870908MY

For Construction Permit for a
New FM Station on Channel 298A
at Germantown, Tennessee

ORDER

Adopted: September 10, 1992; Released: September 17, 1992

By the Commission:

1. By this action we deny reconsideration of a Commission Memorandum Opinion and Order, *Eugene Walton*, 7 FCC Rcd 3237 (1992), affirming the grant of Omni Broadcasting Corporation's application for a new FM Station at Germantown, Tennessee. Now before the Commission are a Petition for Reconsideration filed June 29, 1992 by Pederson Communications Limited Partnership, an Opposition filed July 14, 1992 by Omni, and a Reply filed July 24, 1992 by Pederson. Pederson argues that the Commission erred in failing to fully credit its integration proposal, asserting that it modified its limited partnership agreement within the time limits established by the ALJ for filing integration proposals; that there was no need to show good cause for an amendment of its application; and that, in any event, its original partnership agreement adequately prohibited limited partners from involvement in the management of the station.

2. Despite Pederson's objection to the determination below, it has failed to present new facts or changed circumstances concerning this matter as required by 47 C.F.R. § 1.106(b)(2). We fully considered Pederson's arguments concerning its integration proposal, and reconsideration will not be granted to debate matters upon which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966). Thus, Pederson's Petition for Reconsideration will be denied.

3. ACCORDINGLY, IT IS ORDERED That, the Petition for Reconsideration filed June 29, 1992 by Pederson Communications Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

TELECOMMUNICATIONS RESEARCH
AND ACTION CENTER

For Declaratory Ruling

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1992; Released: September 17, 1992

By the Commission:

1. The Commission has before it a Request For Expedited Declaratory Ruling, filed by Telecommunications Research and Action Center (TRAC) on September 17, 1990.[1] TRAC requests that we issue a declaratory ruling vacating in part our decision in *Oliver Productions, Inc.*, 4 FCC Rcd 5953 (1989). In that decision, we affirmed the Mass Media Bureau's ruling in *Oliver Productions, Inc.*, 3 FCC Rcd 6642 (1988).

2. On November 3, 1988, the Mass Media Bureau granted a Request For Declaratory Ruling filed by Oliver Productions, Inc., which sought a *"bona fide* newscast" exemption from the "equal opportunities" provisions of Section 315(a) of the Communications Act for the "news reporting segments" of its program, "The McLaughlin Group." The Bureau granted the exemption, and TRAC, which was not a party to the Bureau's decision, appealed that decision to the Commission, arguing that the Bureau misinterpreted and misapplied Section 315 in granting the exemption.

3. We affirmed the Bureau's decision. We dismissed TRAC's argument that the "news reporting segments" should have been exempted from the 315(a) requirements under the "fleeting use" exception rather than the *"bona fide* newscast" exception to that Section.[2] We noted, in this regard, that some of the "news reporting segments" lasted about 30 seconds, which would preclude a finding that all the segments at issue were "fleeting." We also found that the "news reporting segments" satisfied the criteria necessary for the newscast exemption under Section 315(a)(1), *i.e.*, they were *bona fide* news reports and they were presented in a conventional news reporting format.

4. TRAC appealed our decision to the U.S. Court of Appeals for the District of Columbia Circuit. The court dismissed TRAC's petition. *TRAC v. FCC*, 917 F.2d 585 (D.C. Cir. 1990). TRAC had argued on appeal that the "news reporting segments" of "The McLaughlin Group" were not exempt under Section 315(a)(1). The court reasoned, however, that since TRAC had argued before the Commission that the segments were "fleeting uses," also not subject to the "equal opportunities" provisions of Section 315, the Commission's decision to use the *"bona fide* newscast" rationale to come to *the same result* did not harm TRAC. Since TRAC had suffered no injury, it lacked standing to bring its appeal. "That TRAC disagrees with the rationale employed by the FCC to reach a result it endorsed below does not constitute injury cognizable for standing purposes." *Id.* at 588.

5. The court acknowledged, however, that its decision was a narrow one, specific to the facts of the case. It noted that if "The McLaughlin Group's" format subsequently changed, TRAC "would likely have viewer standing to raise a properly framed challenge to the continued applicability of the *bona fide* newscast exemption." *Id.*

6. In the instant request, TRAC contests our decision that the "news reporting segments" of "The McLaughlin Group" are *"bona fide* newscasts." TRAC claims that it has recently reviewed "news reporting segments" aired on "The McLaughlin Group" and that they differ significantly from those segments originally considered by us. TRAC states that the new segments are longer than those we originally considered and that it would never have considered these new segments to be "fleeting uses." In support, TRAC states that a recent segment on the program featured an appearance by a candidate for public office for 15 consecutive seconds, and another segment included a 40 second appearance by another candidate. TRAC also alleges that the "sound bites" accompanying each appearance were longer than those we originally considered and featured voices other than that of the moderator, Mr. McLaughlin. TRAC claims that the 40 second appearance referred to above contained a 15-second "sound bite" and another segment contained a 9-second "sound bite."

7. The length of a candidate's appearance in a "news reporting segment" was not a relevant factor in our decision in *Oliver Productions, Inc.* Neither the length of the newscast nor the length of the "sound bites," as described by TRAC in its petition, would alter the conclusions we reached in our original decision. We based that decision on our findings that the news segments satisfied the criteria necessary for the newscast exemption under Section 315(a)(1), *i.e.*, that the segments are *"bona fide"* and are presented in a conventional newscast manner. *See Clark W. Thompson*, 40 FCC 328, 329 (1962). Further, the Commission, in its recent political programming *Report and Order*, affirmed that "a determination of whether a program qualifies as *bona fide* newscast should be judged solely on the basis of whether a program reports news of some area of current events in a manner similar to more traditional newscasts." *Report and Order*, 7 FCC Rcd 678, 684 (1991).[3] TRAC's petition does not raise any issues that

[1] A subsequent pleading, entitled "Petition for Reconsideration," was filed on March 15, 1991, by TRAC and the Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights (WACCI-VCR), requesting that we act upon its declaratory ruling. WACCI-VCR was not a party to TRAC's original request for declaratory ruling.

[2] The Commission has recognized that 315(a) does not apply to a "fleeting use." A "use" is "fleeting" if the candidate's appearance is *de minimis* in either length or format. Although the Commission has not established a specific length of time to define a "fleeting use," it has not applied the exception to uses longer than a few seconds. *See Oliver Productions, Inc.*, 4 FCC Rcd at 5954.

[3] TRAC has appealed our decision regarding *bona fide* newscasts in the *Report and Order* to the Court of Appeals for the District of Columbia Circuit. *TRAC v. FCC*, No. 92-1097 (D.C. Cir. filed Feb. 28, 1992).

would dissuade us from our decision that the "news reporting segments" of "The McLaughlin Group" are *"bona fide* newscasts."

8. Further, TRAC has presented no evidence that there has been a significant change in format in the "news reporting segments" from those segments originally considered. TRAC's claims are not substantiated by any records or other documentation other than statements made in its pleading. Moreover, in our previous decision, we noted that the duration of appearances lasted from a fraction of a second to *about* 30 seconds. There is not such a significant difference between "about" 30 seconds and 40 seconds to even warrant the allegation that a significant change in format has occurred. Finally, with regard to "sound bites," we stated that "McLaughlin reports on current and national news using methods typical of traditional newscasts." This would clearly entail the use of "sound bites" of varying lengths.

9. After careful review of TRAC's Request, we find that none of the factors raised by TRAC go to the criteria used to determine whether a "news reporting segment" qualifies as a *"bona fide* newscast." Moreover, even assuming that the length of the appearance by a candidate was relevant, TRAC has presented no evidence that the lengths currently used on "The McLaughlin Group" are significantly different than those we previously considered.

10. Accordingly, pursuant to Section 1.2 of the Commission's rules, the Request For Expedited Declaratory Ruling is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Tele-Compute Corporation — File No. ENF-92-04

Apparent Liability for Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: August 31, 1992; Released: September 17, 1992

By the Commission:

I. INTRODUCTION

1. By this Notice of Apparent Liability (NAL), we initiate enforcement action against Tele-Compute Corporation (Tele-Compute), a provider of adult entertainment telephone messages, for apparent violations of Section 223(b) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 223(b).[1] Section 223(b), which regulates the provision of obscene and indecent telephone messages, states in pertinent part that parties who knowingly and for commercial purposes, by means of telephone, transmit obscene communications, or make indecent communications available to minors without restriction, will be subject to certain penalties.[2] For the reasons discussed below, we have determined that Tele-Compute is apparently liable for a forfeiture in the amount of $400,000 for the violations.

II. THE COMMISSION'S INVESTIGATION

2. On November 19, 1991, the Commission's Common Carrier Bureau (Bureau) received information indicating that a subscriber line in the District of Columbia, subsequently determined to be leased by Tele-Compute from Chesapeake and Potomac Telephone Company, and a (900) line, subsequently determined to be leased by Tele-Compute from American Telephone and Telegraph, were being used to provide sexually explicit recorded telephone messages.[3] in possible violation of the Communications Act and Commission rules and policies. Commission staff subsequently telephoned the numbers and confirmed the sexually explicit content of the messages. At the Bureau's request, the Commission's Field Operations Bureau (FOB) telephoned Tele-Compute's message service at various times between December 9, 1991 and December 23, 1991, and recorded the messages that it accessed.[4] In most cases, the messages were readily accessible to the Bureau and FOB staff members and by inference, to any other caller regardless of the caller's age.[5] In no instance did the message provider require an access code, other than the "lucky number" which was available to any caller, or credit card number before the messages were transmitted, or use any other effective method to restrict access by minors.[6]

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[1] Section 223(b) was amended by Congress in 1989 to reflect the constitutional concerns expressed by the Supreme Court in *Sable Communications v. FCC*, 492 U.S. 115, 109 S. Ct. 2829 (1989). *See* Labor Health and Human Services Appropriations Act, Pub. L. No. 101-166, §521(i), *reprinted in* 1989 U.S. Code Cong. & Admin. News, 103 Stat. 1159, 1192-94 (1989).

[2] Section 223(b) states in part:

> (1) Whoever knowingly --
>
> (A) within the United States, by means of telephone, makes (directly or by recording device) any obscene communication for commercial purposes to any person, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined in accordance with Title 18, United States Code, or imprisoned not more than two years, or both.
>
> (2) Whoever knowingly --
>
> (A) within the United States, by means of telephone, makes (directly or by recording device) any indecent communication for commercial purposes which is available to any person under 18 years of age or to any other person without that person's consent, regardless of whether the maker of such communication placed the call; or
>
> (B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

47 U.S.C. § 223(b).

[3] The (900) number is ostensibly a numerology hotline which provides callers with a "lucky number". This "lucky number" is then accepted by an automated messaging system on the D.C. subscriber line as the key to accessing the dial-a-porn. The "lucky number" can only be used once and must be used within three hours of completing the call to the numerology hotline.

[4] *See* Appendix for a precise record of the dates and times of FOB's calls. Tapes and transcripts of Tele-Compute's dial-a-porn messages, as recorded by FOB, are on file at the Commission in the Common Carrier Bureau.

[5] In some instances, the automated messaging system failed to recognize "lucky numbers" obtained from the numerology hotline. In these instances the messaging system termed the numbers "unlucky", denied access to the dial-a-porn messages, and instructed the caller to call the numerology hotline for new "lucky numbers".

[6] Prevention of access by minors is relevant to determining whether Section 223(b)(2), which prohibits making indecent communications available to minors by telephone for commercial purposes, has been violated. In contrast, access by minors is irrelevant to determining whether Section 223(b)(1), which prohibits making obscene communications available to anyone by telephone for commercial purposes, has been violated. In the instant case, the only apparent measure taken by Tele-Compute to block access by minors was to program its automated numerology system to refuse to accept a birthdate reflecting an age less than eighteen. However, based on the series of calls placed by the staff, the system required no verification that the

3. The Tele-Compute messages provided over the D.C. subscriber line and recorded during the investigation all contain a preamble instructing the caller to call the (900) number to get a "lucky number" in order to access the dial-a-porn. The preamble also tells the caller that the only charge is a five dollar ($5.00) per-call charge which appears on the caller's phone bill for the call to the (900) numerology hotline and touts the discreteness of this arrangement. Under these circumstances, it is clear that the messages were transmitted in connection with a business enterprise and, therefore, clearly were "for commercial purposes" within the meaning of Section 223(b).[7]

4. It is clear to this Commission that the numerous messages transmitted by Tele-Compute that were recorded by the FOB are obscene within the meaning of Section 223(b) and prevailing Supreme Court precedent.[8] Applying the three criteria of the *Miller* definition to the messages at issue in this proceeding, we first determine that, taken as a whole, the messages appeal to the prurient interest of the average person.[9] Second, we find that, taken as a whole, the messages include numerous distinctive characterizations of sexual acts or organs, describe various methods of sexual intercourse (including anal, vaginal, and oral), and depict or describe, in a patently offensive way, the "hard core" sexual conduct specified by the Supreme Court in the *Miller* case.[10] Most, if not all, of the messages recorded during the Commission's investigation explicitly describe ultimate sexual acts in a patently offensive manner. The descriptions are highly vulgar and degrading and appear to us to be patently offensive and to go well beyond what an average adult person in any community would consider to be portrayals of sexual conduct worthy of protection. Third, we find that no reasonable person would conclude that the messages have any serious literary, artistic, political, or scientific value. Accordingly, the recorded messages appear, in our view, to be obscene within the meaning of the *Miller* definition.

5. We have evaluated both the transcripts of the recorded messages and the audio presentations of the messages themselves in making our evaluation in this case. Each presentation contains verbal inflections, such as heavy breathing and screams, clearly intended to portray hard core sexual activity. As noted above, we find that the descriptions are obscene. Thus, we conclude that, by providing these messages via telephone, Tele-Compute has apparently violated Section 223(b)(1) of the Act.

6. Even if it could be argued that the recorded messages do not fall within the definition of obscenity as contemplated by Section 223(b)(1), we find the messages to be indecent under Section 223(b)(2) and Supreme Court and Commission precedent.[11] Indecent speech is a broader, less restricted category of speech.[12] Speech is considered indecent if it describes sexual or excretory activities and organs in patently offensive terms.[13] It need not depict or describe the type of "hard core" sexual conduct specified in *Miller*.

7. One of the principal goals of Section 223(b) is the protection of children from exposure to sexually explicit communications on the nation's telephone network.[14] The Commission has previously stated that "the concept of indecency is intimately connected with the exposure of children to material that most parents regard as inappropriate for them to hear."[15] Section 223(b)(3) of the Act strikes a balance between the goal of protecting children from exposure to indecent speech and the rights of consenting adults by requiring message providers to employ effective means to block access by minors to such communications while enabling adults to access the adult messages if they so desire.[16] Section 64.201 of the Commis-

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birthdate entered by the caller via a touch-tone telephone was in fact the caller's true birthdate. We find this measure inadequate for purposes of preventing access by minors as required by Section 223(b)(2). (*See infra* footnote 17.)

[7] The fact that the transmission of Tele-Compute's messages was by recording device rather than by a live person is irrelevant for purposes of 223(b). Congress amended Section 223 precisely to cover the type of recorded message services involved in this case.

[8] Under *Miller v. California*, 413 U.S. 15 (1973), a work is obscene if

> (a) an average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24.

[9] The Supreme Court has defined prurient as "that which appeals to a shameful or morbid interest in sex." *Brocket v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985); *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957). We find that the messages, which consist entirely of detailed, repeated, explicit descriptions and simulations of a wide range of sexual activities, satisfy this definition. Indeed, the very purpose of these dial-a-porn messages is apparently to appeal to the prurient interest.

[10] In *Miller*, the Supreme Court gave examples of what a statute could define as "patently offensive" depictions or descriptions of sexual conduct:

> (a) Patently offensive representations or depictions of ultimate sexual acts, normal or perverted, actual or simulated, and
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Miller v. California, 413 U.S. at 25.

[11] *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1977). *See also, Action for Children's Television v. FCC*, 852 F.2d 1332, 1334 (D.C. Cir. 1988) (upholding FCC's generic definition of indecency); *Evergreen Media Corp. of Chicago AM*, 6 FCC Rcd 502 (1991); *Guy Gannett Publishing Co.*, 5 FCC Rcd 7688 (1990); *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987); *Infinity Broadcasting Corp.*, 2 FCC Rcd 2705 (1987); *Regents of the University of California*, 2 FCC Rcd 2703 (1987); *order on reconsideration, Infinity Broadcasting Corp.*, 3 FCC Rcd 930 (1987).

[12] *See Pacifica*, 438 U.S. at 732; *Pacifica Foundation*, 56 FCC 2d 94, 98 (1975). *See also Information Providers Coalition for the Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991); *Dial Information Services v. Thornburgh*, 938 F.2d 1535, 1540-41 (2d Cir. 1991); *Sable*, 492 U.S. 115.

[13] *See Pacifica*, 438 U.S. at 732. *See also Action for Children's Television*, 852 F.2d at 1335.

[14] 135 Cong. Rec. S15,793, 15,800-01 (daily ed. Nov. 16, 1989) (statement of Sen. Helms); *id.* at S15,795 (statement of Sen. Coats).

[15] *Infinity Broadcasting of Pennsylvania, et al.*, 3 FCC Rcd 930, 931-32 (1987).

[16] As noted in footnote 6, *supra*, whether the messages were

sion's Rules specifies three different blocking techniques that the Commission has determined will operate as defenses to prosecution under subsection 223(b)(2) for making indecent communications available to minors by telephone for commercial purposes.[17] At no time during the Commission's investigation were any of the Commission-approved blocking methods or any other effective restrictive measures used by Tele-Compute in connection with the recorded messages.

8. Based on the foregoing, it appears that Tele-Compute has willfully and repeatedly violated Section 223(b) of the Act and that imposition of forfeiture penalties is warranted. Under Section 223(b)(5) of the Act, the Commission has the authority to levy a civil fine[18] not exceeding $50,000 for each violation. The statute further states that each day of violation shall be treated as a separate violation.[19] In the instant case, our investigation shows that Tele-Compute apparently violated Section 223(b) of the Act by transmitting obscene and, without effectively restricting access by minors, indecent communications on at least eight days. Thus, for the purposes of this forfeiture proceeding, we find eight separate violations by Tele-Compute, each warranting a penalty under Section 223(b)(5).

9. The Commission has adopted standards for assessing forfeitures in particular cases.[20] Pursuant to the *Policy Statement*, we treat the Section 223(b) statutory maximum of $50,000 per violation "as if it were a prescribed base amount, subject to downward adjustments."[21] However, none of the downward adjustment factors or any other equitable factors applies to the facts before us in this case.[22] Thus, after due consideration, we find that a forfeiture of $50,000 for each of the eight violations, a total of $400,000, is appropriate.

III. CONCLUSION

10. We have carefully evaluated the information obtained as a result of our investigation, and have determined that there have been at least eight apparent violations of Section 223(b) of the Act by Tele-Compute. From the facts adduced, we can reasonably conclude that, during the period monitored, Tele-Compute's tape recorded adult messages, specified in the Appendix, were provided over the telephone network without adequate restrictions to prevent access by minors. Furthermore, because we find the recorded messages provided by Tele-Compute over its D.C. subscriber line and recorded by FOB to be consistently obscene and indecent, we can reasonably conclude that other Tele-Compute messages available during the period of investigation were obscene and indecent as well.

11. Accordingly, we find that Tele-Compute willfully and repeatedly violated Section 223(b)(1) of the Act by making obscene communications by telephone for commercial purposes from at least December 9, 1991 through December 23, 1991. We further conclude that Tele-Compute violated Section 223(b)(2) by failing to adequately restrict access by minors to indecent telephone communications transmitted for commercial purposes during the same time period.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§151, 154(i), 154(j), and 223(b), that Tele-Compute is apparently liable for forfeiture in the amount of $400,000 for its willful and repeated violations of Section 223(b) of the Act, 47 U.S.C. § 223(b), in the manner and on the dates described above.

13. IT IS FURTHER ORDERED that Tele-Compute shall within thirty days of the release date of this notice pay the full amount of the proposed forfeiture or file a response showing why the proposed forfeiture should not be imposed or the reason why the proposed forfeiture should be reduced.[23] If the forfeiture is not paid, the response should include supporting evidence sufficient to rebut the tentative conclusions outlined in this notice.

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accessible by minors is irrelevant for purposes of determining whether a violation of Section 223(b)(1), pertaining to obscene communications, has occurred.

[17] *See* 47 C.F.R. § 64.201. The techniques include: (1) requiring payment by credit card; (2) use of, prior to transmission, an access or identification code which has been issued to the customer by mail following receipt of a written application; and (3) message scrambling. The message provider must also have notified the carrier, in writing, of its provision of indecent messages. 47 C.F.R. § 64.201. We note that the Supreme Court has acknowledged the feasibility of each of these blocking techniques. *See Sable*, 109 S. Ct. at 2838-39.

[18] The statute's use of the term "civil fine" is interchangeable with the Commission's historical use of the term "forfeiture" and for the purposes of enforcing Section 223(b), we will continue to use the term forfeiture.

[19] Section 223(b)(5) states:

> (A) [W]hoever, within the United States, violates paragraph (1) or (2) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.
>
> (B) A fine under this paragraph may be assessed... by the Commission after appropriate administrative proceedings.

47 U.S.C. § 223(b)(5).

[20] Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), *recon. denied*, 70 RR 2d 1206 (1992), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992) (*Policy Statement*).

[21] *Id.* at 4701. Several of the upward adjustment criteria listed in the *Policy Statement* would be appropriate to apply to this forfeiture. However, $50,000 per violation is the statutory maximum. *Id.* at 4700.

[22] The downward adjustment criteria are: (1) minor violation; (2) good faith or voluntary disclosure; (3) history of overall compliance; and (4) inability to pay. Inability to pay is considered only upon a specific showing by the entity against whom forfeiture action is taken. *Id.* at 4700.

[23] The forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.

14. IT IS FURTHER ORDERED that a copy of this Notice shall be sent by certified mail, return receipt requested, to Tele-Compute Corporation, Suite G-9, 1275 K Street, N.W., Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Call Set #1

12/9/91	(900) line	4:05 p.m.
12/9/91	subscriber line	4:10 p.m. and 4:26 p.m.

Call Set #2

12/10/91	(900) line	4:00 p.m.
12/10/91	subscriber line	4:07 p.m.

Call Set #3

12/11/91	(900) line	3:58 p.m.
12/11/91	subscriber line	4:00 p.m.

Call Set #4

12/13/91	(900) line	3:40 p.m.
12/13/91	subscriber line	4:00 p.m.

Call Set #5

12/17/91	(900) line	4:12 p.m.
12/17/91	subscriber line	4:15 p.m.

Call Set #6

12/18/91	(900) line	4:04 p.m.
12/18/91	subscriber line	4:08 p.m.

Call Set #7

12/19/91	(900) line	4:00 p.m.
12/19/91	subscriber line	4:05 p.m.

Call Set #8

12/23/91	(900) line	4:01 p.m.
12/23/91	subscriber line	4:05 p.m. and 4:10 p.m.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	File Nos. BRED-880923YM
	BR-881003VM
License Renewal	BRH-881003VF
Applications of Stations	BR-881003VJ
WFSQ(FM),[1]	BRH-881003VK
Tallahassee, FL	BR-881003VE
WNDB(AM)/WWLV(FM),[2]	BRH-881003YJ
Daytona Beach, FL,	
WLKF(AM)/WEZY-FM,	
Lakeland, FL, and	
WMMB(AM)/WGGD(FM),	
Melbourne, FL	

MEMORANDUM OPINION AND ORDER

Adopted: September 1, 1992; Released: September 17, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) a timely filed petition by the Florida State Conference of Branches of the NAACP and its respective branches (hereinafter "NAACP") requesting that the Commission reconsider its September 25, 1990, decision to grant Florida State University's renewal application with reporting conditions for Station WFSQ(FM), Tallahassee, Florida, and Chapman S. Root Revocable Trust's (hereinafter "Root") renewal applications with reporting conditions and a Notice of Apparent Liability of forfeiture for $5,000 for Stations WNDB(AM)/WWLV(FM), Daytona Beach, Florida, *Applications of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities*, 5 FCC Rcd 5683 (1990) (*Sarasota*); (ii) a timely petition filed by the NAACP requesting that the Commission reconsider its November 6, 1990, decision to grant Root's renewal applications with reporting conditions for Stations WLKF(AM)/WEZY-FM, Lakeland, Florida, and City Broadcasting Company, Inc.'s renewal applications for a short term with reporting conditions and a Notice of Apparent Liability of forfeiture for $10,000 for Stations WMMB(AM)/WGGD(FM), Melbourne, Florida,[3] *Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area*, 5 FCC Rcd 6738 (1990) (*Melbourne*); (iii) the licensees' oppositions to these petitions; (iv) Root's untimely filed petitions requesting that the Commission reconsider its decisions in *Sarasota* and *Melbourne* regarding Stations WNDB(AM)/WWLV(FM) and WLKF(AM)/WEZY-FM and grant their renewal applications without sanctions; and (v) various other pleadings. NAACP alleges that the above-captioned stations violated the Commission's equal employment opportunity (EEO) Rule and policies and that the Commission erred when it granted the stations' renewal applications. It requests that the Commission reconsider its decision, designate these renewal applications for hearing and thereafter deny them. For reasons discussed below, we deny NAACP's pleadings and affirm our original grant of the renewal applications. In addition, we dismiss Root's Petitions for Reconsideration and, accordingly, we will impose a Notice of Forfeiture in the amount of $5,000 for EEO violations occurring at Stations WNDB(AM)/WWLV(FM).

II. PROCEDURAL MATTERS

2. Standing: In its petition for reconsideration of the Commission's *Sarasota* decision to grant the renewal applications of Stations WNDB(AM)/WWLV(FM), the NAACP argues that it should have been considered a petitioner, not an informal objector. The Commission ruled that the NAACP was not a petitioner because its untimely declaration from one of its members failed to prove its party in interest status as required by Section 309(d)(1) of the Communications Act, as amended, 47 U.S.C. Section 309(d)(1). In its petition for reconsideration, the NAACP argues that because the licensee never objected to the declaration filed seven weeks late and because the Commission accepted the licensee's renewal application two days late, the Commission should have accepted the NAACP's late-filed declaration. The licensee's lack of response to the NAACP petition on timeliness grounds and the Commission's treatment of the licensee's renewal application are not relevant to the issue of NAACP's standing as a petitioner. As we stated in *Application for Certain Radio Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988), we will not accept the petitioners' late filings without substantial justification. None of the NAACP's arguments persuade us to overturn our previous decision regarding its standing as an informal objector. The NAACP was also an informal objector regarding Stations WMMB(AM)/WGGD(FM) in *Melbourne*. Therefore, the NAACP has no standing to bring petitions for reconsideration of our decisions involving these four stations and its petitions against these stations are dismissed. 47 C.F.R. Section 1.106(b)(1). *Redwood Microwave Association Inc., Mount Sanherdin, Pratt Mountain and Mt. Pierce, California*, 61 FCC 2d 442 (1976); *Montgomery County Broadcasting Corp., Montgomery City, Missouri*, 65 FCC 2d 875 (1977); *University of North Carolina*, 4 FCC Rcd 2780 (1989).

3. Timeliness: Regarding the Petitions for Reconsideration filed by Root for Stations WNDB(AM)/WWLV(FM) and WLKF(AM)/WEZY-FM, we note that they were not timely filed under Section 405 of the Communications Act, as amended, 47 U.S.C. Section 405. Accordingly, Root's petitions for reconsideration are dismissed.

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[1] Station WFSU(FM) changed its call letters to WFSQ(FM) on October 14, 1990.

[2] Station WWLV(FM) changed its call letters to WCFB(FM) on July 17, 1992. Due to the recent nature of the call letter change, we will refer to the station as WWLV(FM) in this Order.

[3] We note that the licensee of Stations WMMB(AM)/WGGD(FM) timely paid the forfeiture.

III. DISCUSSION

4. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *See WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). 47 C.F.R. Section 1.106(c). Applying this standard, we conclude that reconsideration is not appropriate here. However, to clarify the record, we shall address the arguments raised by the NAACP regarding Stations WFSQ(FM) and WLKF(AM)/WEZY-FM in its Petitions for Reconsideration of the Sarasota and Melbourne decisions.

5. NAACP argues that the Commission ignored the substance of the NAACP's reply comments, filed May 15, 1990, and that the Commission erred in failing to consider them because they had merit. As we stated in *Melbourne*, we did consider this pleading. In response to arguments from some licensees that we should not consider the NAACP's reply because it was not timely filed, we stated that we would "consider submissions not authorized by Section 1.45 of the Communications Act, 47 C.F.R. Section 1.45, because we believe the public interest will be better served by doing so." *Id.* at 6738, n.1. However, although not specifically stated in either order, we found that they were without merit and, therefore, did not include them in our analysis of the petition.[4] In much of its reply, the NAACP simply made comments on the licensees' inquiry responses and failed to provide any information not already under review by the Commission. In the remainder of its reply, the NAACP quoted statistics derived from the licensees' applicant flow and hiring data and argued that discrimination could not be ruled out as the cause of these statistical results. However, these statistics are not determinative for two reasons. First, the statistics calculated by the NAACP are not based on the Commission's EEO guidelines but, as indicated by the NAACP, are based on computations used in cases brought under Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e-(2) a. *See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (Broadcast EEO), *petition for reconsideration pending*. Second, as the court stated in *NBMC v. FCC*, "[e]vidence of statistical disparity is not, in and of itself, sufficient grounds for this court to order the FCC to conduct a hearing." 775 F.2d 342, 358 (D.C. Cir. 1985). When challenging an application, a petitioner must establish that granting of an application is prima facie inconsistent with the public interest. 47 U.S.C. Section 309(d)(1). We do not believe that the NAACP has met this standard simply by stating that discrimination cannot be ruled out based solely on hiring and applicant flow statistics derived from Title VII methodology. The petitioner should have addressed the Commission's EEO guidelines that focus on the licensee's efforts to implement an effective EEO program.

Sarasota: Station WFSQ(FM)

6. Turning to specific contentions in the petition for reconsideration of *Sarasota*, we note that the NAACP argues that the Commission erred when it granted the renewal application of Station WFSQ(FM). First, it states that the Commission incorrectly counted the number of hires that occurred at the station during the time under review. The NAACP calculated that the station had 47 hires during this time and yet the Commission listed only 14 in its discussion. Second, it states that the Commission did not sanction the licensee for having a written policy stating that the licensee is permitted to hire for part-time and temporary positions without using affirmative action procedures. Finally, the NAACP argues that the Commission failed to hold the licensee fully accountable for not keeping complete records of its applicants and, by doing so, allowed the licensee's lack of data to immunize it from statistical scrutiny. It argues that the decision to grant the renewal application in this case means all a station needs to do to avoid having to face a statistical inference of discrimination is to keep incomplete data. The NAACP argues that broadcast licensees have long been aware of the Commission's recordkeeping requirements and therefore have no excuse for failing to satisfy these requirements. *Broadcast EEO, supra.*

7. In opposition, the licensee responds that the NAACP hiring figures were different because the NAACP counted all hires whereas the Commission only counted full-time hires. The licensee also states that it has no written policy as described by the NAACP and that it did, in fact, affirmatively recruit for all positions including temporary and part-time. For those particular positions, which often had to be filled quickly, the licensee maintains that it stockpiled applications received as a result of contacts with minority and general sources made three or four times a year. The licensee also states that applicant flow information for all positions was not readily available through its personnel office because the office only keeps applications for two years and only has information regarding the race and gender of applicants for those full-time, permanent positions requiring applications and only then when the information is given by the applicant. The licensee argues that its hiring statistics show that it has made significant rather than token efforts in the recruitment and hiring of minorities.

8. We find that the arguments contained in the NAACP's Sarasota petition for reconsideration to be without merit. As the licensee of Station WFSQ(FM) correctly points out, the Commission's discussion of WFSQ's EEO program was directed at efforts made toward full-time hires. Although the Commission requires that broadcasters provide equal employment opportunity for both full and part-time positions, we primarily focus on full-time hires when analyzing a station's EEO record. While the kind of written policy with respect to part-time and temporary hires alleged by the NAACP would be a matter of concern, it has provided no support for its allegation that such a policy exists. Moreover, the licensee has provided an unrebutted statement (see para. 7, *supra*) that it has no written policy permitting hiring of these positions without

[4] In its opposition to the NAACP's petition for reconsideration for Stations WLKF(AM)/WEZY-FM, Root argues that the NAACP's reply should not be considered by the Commission regarding its stations because Root never received a copy of the reply and the reply therefore violated the *ex parte* rules. However, given our conclusion that the reply was without merit, Root's argument is moot.

affirmative action procedures and that it, in fact, affirmatively recruits for these positions to the extent described above. Similarly, the discrepancies between the NAACP's and the Commission's hiring figures were not due to Commission error but were due to a difference in focus: the NAACP's focus on all hires and the Commission's focus on full-time hires. Based on the foregoing, we conclude that these arguments do not provide justification for reversal of our decision.

9. Next we find without merit the NAACP's contention that the Commission did not hold Station WFSQ(FM) fully accountable for its inadequate recordkeeping and, as a result, sent a message that a station could avoid a statistical inference of discrimination by keeping incomplete EEO data. First, the licensee's failure to keep adequate records of its EEO efforts was a major factor in our decision to impose reporting conditions on the station. In discussing the record of Station WFSQ(FM), we stated that "we are concerned... that the station does not keep track of the gender and race of each applicant when that information is readily available in the University's personnel office... Accordingly, we will grant renewal subject to reporting conditions." *Id.* at 5685. Second, the licensee's failure to keep adequate EEO records did not shield it from a statistical inference of discrimination. Although the licensee's EEO information was incomplete, the data that it did provide indicated that it contacted recruitment sources, including minority sources, when vacancies occurred and attracted and hired minority applicants. Therefore, we appropriately concluded that there was sufficient record evidence to demonstrate a lack of discrimination by the licensee.

Melbourne: Stations WLKF(AM)/WEZY-FM

10. The NAACP argues that the Commission erred when it granted the renewal applications of Stations WLKF(AM)/WEZY-FM. It states that the Commission incorrectly counted the number of hires occurring at the stations as 34, three of whom were minorities, when in fact the actual figure was 72, four of whom were minorities. It states that the Commission's decision to grant these applications means that the hiring of a token number of minorities, even when it is so low that it leads to a statistical inference of discrimination, and where the licensee essentially operated no affirmative action program, will permit a grant of renewal. The NAACP also argues that the licensee had no excuse for its failure to keep adequate EEO records because it has been on notice of this requirement since the release of *Broadcast EEO, supra*, in 1987 and that its lack of recordkeeping may have insulated the licensee from a hearing.

11. We find that the arguments contained in the NAACP's *Melbourne* petition for reconsideration are without merit. The NAACP argues that the Commission undercounted the number of hires occurring at Stations WLKF(AM)/WEZY-FM and, as a result, made the stations' EEO program look twice as effective as it really was. However, as we stated in para. 8, *supra*, the Commission focuses on full-time hires when analyzing a station's EEO record whereas the NAACP has counted both full-time and part-time hires. The NAACP also argues that the Commission failed to hold Stations WLKF(AM)/WEZY-FM fully accountable for their lack of recordkeeping and, as a result, may have insulated the licensee from a hearing. We disagree. In *Melbourne, supra*, we stated that "we are concerned that the licensee apparently lacks important information and documentation that is needed for effective self-asessment," and that this concern was one of the reasons we imposed reporting conditions on the stations. *Id.* at 6740. In addition, as we stated in para. 9, *supra*, we cannot infer discrimination solely on the basis of the statistical data submitted by the NAACP, but rather must look to all information regarding the licensees' EEO programs. Based on our analysis of the data submitted in this case, we concluded that there was a sufficient record to demonstrate a lack of discrimination by the licensee.

IV. CONCLUSION

12. Based on the foregoing, we find that the NAACP does not have standing to petition for reconsideration against Stations WNDB(AM)/WWLV(FM) and WMMB(AM)/WGGD(FM) and, therefore, its petitions against these stations are dismissed. In any event, the NAACP's petitions for reconsideration do not meet the standards necessary for the Commission to reconsider its decisions in *Sarasota* and *Melbourne* to grant the renewal applications of Stations WFSQ(FM) and WLKF(AM)/WEZY-FM and would therefore warrant denial. In addition, we dismiss Root's petitions for reconsideration because they were not timely filed and, accordingly, impose a Notice of Forfeiture in the amount of $5,000 for EEO violations occurring at Stations WNDB(AM)/WWLV(FM).

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the petitions for reconsideration filed by the NAACP against Stations WFSQ(FM) and WLKF(AM)/WEZY(FM) ARE DENIED.

14. IT IS FURTHER ORDERED that the petitions for reconsideration filed by the NAACP against Stations WNDB(AM)/WWLV(FM) and WMMB(AM)/WGGD(FM) ARE DISMISSED.

15. IT IS FURTHER ORDERED that the petitions for reconsideration filed by Chapman S. Root Revocable Trust for Stations WLKF(AM)/WEZY-FM and WNDB(AM)/WWLV(FM) ARE DISMISSED.

16. IT IS FURTHER ORDERED that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order to all parties.

17. IT IS FURTHER ORDERED, that pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503(b), Chapman S. Root Revocable Trust FORFEIT to the United States the sum of five thousand dollars ($5,000) for WNDB(AM)/WWLV(FM)'s failure to comply with the Commission's EEO Rule, 47 C.F.R. Section 73.2080. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument payable to the Federal Communications Commission. In regard to this forfeiture proceeding, the licensee may take any actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. Section 504(a), as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

LELAND BROADCASTING GROUP, INC. File No. BPH-890313MP

For Construction Permit
for a New FM Station on Channel 231A
in Leland, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: August 11, 1992; Released: August 21, 1992

By the Commission:

1. The Commission has under consideration an Application for Review filed June 12, 1991 by Leland Broadcasting Group, Inc. ("Leland"). Leland seeks the reinstatement and designation for comparative hearing of its above-captioned application. By way of background, Leland's application was dismissed by the staff because the transmitter site map, submitted as an exhibit to Section V-B, Item 15, FCC Form 301, was not accompanied by a reduced copy of the entire 7.5 minute map complying with the requirements in the Commission's *Public Notice* entitled "FCC Clarifies Transmitter Site Map Requirements." Mimeo 3693 (released April 5, 1985) (*"Public Notice"*).[1] *Letter from the Chief, FM Branch,* dated June 15, 1989 (reference 8920-F.Long). The dismissal was upheld in the *Hearing Designation Order* in MM Docket No. 91-101, *WCCR Broadcasting Limited Partnership,* 6 FCC Rcd 2554 (M. M. Bur. 1991) (*"HDO"*), in which four other applications for the Leland, North Carolina allotment were designated for comparative hearing.[2]

2. In its petition for reconsideration, Leland admitted that its site map failed to meet the specified requirements contained in the *Public Notice*. Nevertheless, it argued that the staff could confidently and reliably, drawing on the application as a whole, determine its proposed site coordinates, because they were listed consistently throughout the application. Leland also pointed to the Federal Aviation Administration's ("FAA") "Determination of No Hazard," which contained the same geographic coordinates specified in the application. The Mass Media Bureau ("Bureau") staff, however, asserted that the site map contained two defects: (i) it failed to include the requisite full-scale map section set forth in the *Public Notice;* and (ii) the reduced copy of the map submitted lacked the fine lines drawn between the standard printed coordinate markings, labelled with the appropriate latitude and longitude in such a fashion as to enclose the proposed transmitter site. It also ruled that the consistent specification of coordinates elsewhere in the application did not enable the staff to confidently and reliably verify that the site was located as specified and that only a map conforming to the *Public Notice* requirements would enable the staff to make that verification. 6 FCC Rcd at 2554.

3. Leland, in its Application for Review ("Application"), first notes that it has spent considerable resources both as the petitioner seeking allotment of Channel 231A to Leland, North Carolina and in prosecuting its application, and now is precluded from competing for the new FM radio service it had pioneered. Next, it argues that: (i) its application was substantially complete and tenderable, because all information necessary to an accurate verification of the site was set forth in the application; (ii) the full size copy of the relevant portions of the U.S.G.S. map detailed the site, the map exhibit included scale and identifying information, and coordinate markings were shown on either side of the site; (iii) the Commission's Rules do not mandate a copy of the entire map, referencing the instructions to Form 301, the *Report and Order, Statement of New Policy Regarding Commercial FM Applications That Are Not Substantially Complete or Are Otherwise Defective* (*"Statement of New Policy"*), 58 RR 2d 166, 169 (1985), and language in the *Public Notice* to the effect that it is not necessary to submit an entire reduced U.S.G.S. map; and (iv) the site coordinates were consistently specified elsewhere in its application, and the FAA made a determination of no air hazard based on those specifications and the site map. Leland notes that the staff was aware of the FAA determination and should have accepted its substantially complete application, citing *Cielo Communications,* (*"Cielo"*) 3 FCC Rcd 6752 (M. M. Bur. 1988), and *V.O.B. Incorporated* (*"VOB"*), 3 FCC Rcd 6750 (M. M. Bur. 1988). Referencing an exhibit containing an opinion by its consulting engineer, Leland concludes that the staff could have precisely determined the site coordinates solely from information contained in the application.

4. Additionally, Leland argues that the Commission's authority to require substantially complete and timely filed applications does not encompass discretion to reject an application "merely because of a minor, correctable error," citing *James River Broadcasting Corp. v. FCC,* 399 F. 2d 581 (D.C. Cir. 1968); *Radio Athens, Inc. (WATH) v. FCC* 401 F.2d 398 (D.C. Cir 1968); and *Rochelle C. Saltzer v. FCC,* 778 F.2d 869, 872, n.7 (D.C. Cir. 1985). Application, at p. 10. According to Leland, an examination of its application as a whole would not adversely impact anyone, and the *HDO* allowed other applicants to correct errors or omissions in this manner. *Id.* In this regard, Leland contrasts the instant "shortsighted effort" to apply "inhuman

[1] In order to be deemed tenderable pursuant to the FM "hard look" processing standards instituted by the Commission in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) (*"Report and Order"*), all commercial FM applications must include a transmitter site map meeting criteria set forth in the *Public Notice*. *See* 51 Fed. Reg. 45,945 (December 23, 1986). Leland's application was filed on March 13, 1989.

[2] Hara Broadcasting, Inc. ("Hara") and Sharon M. Moran ("Moran"), competing applicants, each filed an opposition to Leland's Application for Review. Leland filed a "Motion For Stay of Proceedings," on June 12, 1991, seeking a stay of the comparative hearing pending action in response to its Application for Review. In response, Hara filed a "Motion to Dismiss Or, In the Alternative, Opposition to Motion For Stay," to which Leland, in turn, filed an "Opposition to Motion to Strike." Moran also opposed Leland's request, submitting a "Motion to Strike." In light of the action taken herein, the stay request will be dismissed as moot.

standards" to the Commission's "willingness to forgive some errors but not others," requesting that the Commission compare *Rebecca Radio of Marco* (*"Rebecca"*), 2 FCC Rcd 4053, 4055 (M. M. Bur. 1987); *Carta Corporation* (*"Carta"*), 3 FCC Rcd 798, 799 (M. M. Bur. 1988); *George Henry Clay* (*"Clay"*), 5 FCC Rcd 317, 318 (Rev. Bd. 1990); *Donna M. Mavritte* (*"Mavritte"*), 6 FCC Rcd 1838 (M. M. Bur. 1991); and *Clarksville Radio* (*"Clarksville"*), 6 FCC Rcd 2505 (M. M. Bur. 1991); with *Nicholasville Broadcasting Corporation* (*"Nicholasville"*), 4 FCC Rcd 2574 (1989); *Steven B. Courts* (*"Courts"*), 4 FCC Rcd 4764 (1989); and *Benjamin Macwan*, (*"Macwan"*), 4 FCC Rcd 4769 (1989). Application, at pp. 11-12. According to Leland, applicants in other proceedings have been given the opportunity to correct "more egregious errors" involving geographic coordinates, citing *Peter J. Rinaldi* (*"Rinaldi"*), 5 FCC Rcd 5649 (M. M. Bur. 1990); *Caprock Educational Broadcasting Foundation* (*"Caprock"*), 5 FCC Rcd 5170 (M. M. Bur. 1990); *Patrick H. Robinson* (*"Robinson"*), 5 FCC Rcd 5146 (M. M. Bur. 1990); *Charles J. Saltzman* (*"Saltzman"*), 2 FCC Rcd 4449 (M. M. Bur. 1987); and *McDowell Broadcasting Corp.* (*"McDowell"*), 2 FCC rcd 3283 (M. M. Bur. 1987). Application, at 12-13.

5. Initially, we reject Leland's arguments based on *James River*. As we have stated consistently since the adoption of the "hard look" commercial FM processing standards, "[b]ecause the processing rules which were the basis for the holding in *James River* have been dramatically changed, that case does not apply ... to either the new [hard look] processing rules or to "substantial completeness" thereunder. *Matthew D. Wiggins, Jr.*, 1 FCC Rcd 401, 402 (1986). The fact that Leland initiated the rulemaking procedure which allotted the new FM channel here is of no import. Leland cites no precedent for relaxing the hard look requirements where a petitioner-applicant is concerned, nor can any be found. All applicants are on equal footing with respect to the Commission's tenderability and acceptability requirements.[3]

6. Leland's principal remaining arguments essentially parallel those made in its petition for reconsideration: that the coordinate markings on the site map section as reproduced were incomplete but, nevertheless, Leland's application was substantially complete because all information necessary for accurate verification of its transmitter site was set forth in the application.

7. We disagree. The *Public Notice* provides for two alternative site map submissions. The first requires use of a full scale map showing "along the printed margin of both axes at least two coordinate markings, specifically labelled by the U.S.G.S., one on either side of the marked site... It is not necessary to submit an entire map (although this is entirely acceptable), but only as much as is necessary to fully comply with the requirements described above." 51 Fed. Reg. at 45,945. The alternative site map submission requires: (i) a full scale copy of the map section containing the site, including one margin and two U.S.G.S.-printed cross marks, between which fine lines have been drawn to enclose the site; *and* (ii) a reduced copy of the entire map "to allow the Commission's staff to verify that the lines have been correctly labelled." *Id.* Leland's map submission failed to include both the reduced copy of the entire map and the full scale map section containing the fine lines defining the latitude and longitude of the proposed transmitter site. Although the staff inadvertently mischaracterized the two defects in Leland's site map submission as failure to include (i) a full-scale map section and (ii) a reduced copy with fine lines defining the site's latitude and longitude, it is clear that Leland's map submission failed to meet either acceptable map alternative set forth in the *Public Notice*.

8. The Commission has consistently held that, absent the required map, the staff cannot confidently and reliably verify an applicant's site information. *See, e.g., Apple Communications*, 7 FCC Rcd 1467 (1992); *Lamoille Broadcasting and Communications General Partnership*, 7 FCC Rcd 2700 (1992). Notwithstanding the consistent specification of the site coordinates in the application nor the FAA approval of those coordinates, verification of the correctness of the site information requires submission of a map which complies with the *Public Notice*.[4]

9. Leland's next argument is that, notwithstanding the "hard look" FM processing procedures, "the Commission has demonstrated a willingness to forgive some errors but not others." Application, at 11. Leland's numerous case citations are inapposite. *Nicholasville*, *Courts*, and *Macwan* involved applications listing conflicting geographic coordinates which rendered the subject applications unprocessable.[5] The fact that the defect in those cases was arguably more serious than the defect here has no bearing on the instant return of Leland's application for a site map deficiency. Of the remaining cases cited by Leland, *Rebecca* involved an applicant who was permitted to file an amendment resolving a coordinate discrepancy because, in the *Memorandum Opinion and Order* on reconsideration of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 43,157 (1985), we stated that the reinstatement of one member of a group of mutually exclusive applicants provides the opportunity for the others to amend within 30 days following the release of a public notice announcing the tenderability of the reinstated applicant. *See Taber Broadcasting Co.*, 4 FCC Rcd 7892, 7893 (1989). *Carta* concerned applicants proposing use of an existing broad-

[3] The Commission recently modified the "hard look" processing rules, and made these rules effective as of August 7, 1992. *Report and Order, Commercial FM Broadcast Applications*, MM Docket No. 91-347, 7 FCC Rcd _____ (adopted July 16, 1992). The Commission determined that applications filed prior to that date would continue to be processed under the rules in effect on the date of the application's receipt.

[4] The coordinates provided on FAA Form 7460-1, information which the FAA uses to determine a proposed tower's potential to be a hazard to air navigation, are supplied by the applicant to the FAA from information submitted to the Commission on FCC Form 301 and, consequently, are subject to the same errors and inexactitude. Thus, the Commission has consistently held that the information submitted to the FAA does not enable the staff to verify confidently and reliably an applicant's transmitter site information. *JEM Broadcasting Company, Inc.*, 7 FCC Rcd 4252 (1992); *Coachella Valley Wireless Corporation*, 7 FCC Rcd 4324 (1992). Although Leland cited *Cielo* and *VOB* for the proposition that the FAA's no hazard determination requires that our staff accept the accuracy of the coordinates which that agency relied upon, those cases are inapposite as they did not involve maps or FAA submissions.

[5] The Bureau has consistently dismissed FM applicants whose proposals contained conflicting geographic coordinates and did not propose to utilize an exiting tower, *see Macwan*, 4 FCC Rcd at 4770, and the cited cases, just as it has consistently returned those whose site maps do not comply with the *Public Notice*. *Apple Communications*, 7 FCC Rcd at 1468.

cast tower who incorrectly specified the tower's geographic coordinates. Because the staff could readily verify the actual coordinates by taking official notice of information already in Commission files, corrective amendments were allowed. *Clay* involved a post designation request to correct inconsistent site coordinates. The Commission's Review Board there held that the "hard look" predesignation processing standards did not bind the parties or administrative law judge after designation. We have since held that the acceptance of the curative amendment in *Clay* was inconsistent with Commission precedent and therefore not controlling. *See R. Donnie Goodale*, 7 FCC Rcd 1495, 1497 (1992). *Clarksville* involved defective amendments, and the Bureau correctly noted that the "hard look" processing standards do not apply to amendments. *See Taber*, 4 FCC Rcd at 7893. In *Mavrite*, an applicant's transmitter site location, gratuitously described in an engineering exhibit, did not agree with the coordinates specified and plotted consistently throughout the proposal. The erroneous narrative description violated no tenderability or acceptability requirement. However, upon determining that the narrative description was clearly erroneous, the staff, in accordance with its usual policy in such situations, nevertheless requested a corrective amendment in order to maintain consistency throughout the application. *See JEM Broadcasting Company, Inc.*, 7 FCC Rcd at 4326. Not one of these cases supports a finding that the Bureau acted arbitrarily in returning Leland's application for failure to submit a proper site map.

10. Finally, Leland cites several cases for the proposition that its site map deficiency was "truly a minor omission. Indeed, more egregious errors are not an unusual occurrence and other applicants have been given an opportunity to amend their applications to correct such minor matters." Application, at 12. As indicated above, the failure to supply a proper site map is far from a minor omission, as it prevents the staff from verifying the proposed site location with the requisite degree of accuracy. Again, Leland's case authority is misplaced. *Rinaldi*, *Robinson*, and *McDowell* involved inconsistent coordinates, but also involved specification of existing towers; a corrective amendment was therefore appropriate in each case. *Caprock* also involved specification of an existing tower. In *Caprock*, the tower heights above ground level and above mean sea level listed by the applicant did not match those in the Commission's records. The staff found that, while the discrepancy did not affect the acceptability of Caprock's proposal, a clarifying amendment would be required. Similarly, in *Saltzman*, the site coordinates, while consistently specified throughout the application and correctly plotted on a proper site map, did not match those in the Commission's records for the indicated tower. Again, a clarifying amendment was therefore appropriate.

11. In sum, Leland has cited no case which demonstrates that its proposal was treated differently than those similarly situated. Accordingly, for the reasons set forth above, IT IS ORDERED, that the Application for Review filed by Leland Broadcasting Group, Inc. On June 12, 1991 IS DENIED. Additionally, the "Motion for Stay of Proceedings, filed by Leland on June 12, 1991, IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-84

In re Applications of

RADIO REPRESENTATIVES, INC. File No. BPH-870910MD

KASA MOKU KA PAWA BROADCASTING, INC. File No. BPH-870910MZ

For Construction Permit for
New FM Station, Channel 290C,
Honolulu, Hawaii

Appearances

Gerald Stevens - Kittner, Esq. and *Peter H. Doyle, Esq.*, on behalf of Radio Representatives, Inc.; *Paul A. Zevnik, Esq.*, on behalf of Kasa Moku Ka Pawa Broadcasting, Inc.; and *Y. Paulette Laden, Esq.*, on behalf of the Chief, Mass Media Bureau.

DECISION

Adopted: August 7, 1992 **Released: August 21, 1992**

By the Review Board: BLUMENTHAL, ESBENSEN, and GREENE.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision*, 7 FCC Rcd 2224 (1992) (I.D.), of Administrative Law Judge Joseph P. Gonzalez (ALJ). Radio Representatives, Inc. (RRI) filed Exceptions; Kasa Moku Ka Pawa Broadcasting, Inc. (KMKP) (the prevailing applicant) and the Commission's Mass Media Bureau (Bureau) filed replies thereto. Pursuant to the guidelines established in the Commission's *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 167 (1990), *recon. granted in part*, 6 FCC Rcd 3403 (1991), the Board has determined that oral argument in this proceeding would not materially assist in its resolution.

BACKGROUND

2. The hearing below was heard on the following (renumbered) issues:

> [1]: If a final environmental impact statement is issued with respect to [both captioned applicants] in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. Section 1.1301-1319.
>
> [2]: To determine whether there is a reasonable possibility that the tower heights, locations and/or frequency proposed by the applicants in this proceeding would constitute a hazard to air navigation.
>
> [3]: To determine whether the proposals of [both captioned applicants] will provide the coverage required by Section 73.315(a) of the Commission's Rules, and if not, whether evidence exists which would warrant a waiver.
>
> [4]: To determine the facts and circumstances surrounding the conviction of Norwood J. Patterson, a stockholder and the current President of RRI, for violation, in his operation of Commission licensed broadcast facilities, of federal laws pertaining to the withholding of employee's income taxes.
>
> [5]: To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> [6]: To determine in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. Issues [1] and [2] were favorably resolved with respect to both remaining applicants. *See Orders*, FCC 92M-395, issued March 26, 1992 (KMKP); FCC 90M-2594, issued August 17, 1990 (RRI); FCC 92M-379, issued March 25, 1992 (KMKP); and, FCC 92M-376, issued March 25, 1992 (RRI). No exceptions by either party have been filed with respect to these issues. Issue [4] was favorably resolved with respect to RRI (I.D. at paras. 7-10), and KMKP has not taken exception to the ALJ's resolution of this matter.

4. With respect to the "standard comparative issue" (Issue [5]), the ALJ determined that KMKP was the clear winner because it alone proposed full-time integration of ownership into management of all its voting stock owners. I.D., paras. 23, 25-29. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Moreover, RRI alone was found to have attributable to it several broadcast facilities under the "diversification of media interests criterion," *see* I.D. at paras. 18-19; *see also Policy Statement*, 1 FCC 2d at 396, while KMKP suffered no diversification demerit. I.D. at para. 24. Neither applicant has filed exceptions to the ALJ's resolution of the comparative aspects of this proceeding.

5. Thus, the sole question before the Board is the ALJ's resolution of Issue [3]. The ALJ concluded that both applicants are in substantial compliance with (or entitled to a waiver of) 47 CFR § 73.315(a). KMKP and the Bureau support this conclusion, while RRI asserts that KMKP is not in compliance and should therefore be absolutely disqualified.

EXCEPTIONS

6. 47 CFR § 73.315(a) ("FM Transmitter Location") requires that all proposed FM stations provide a minimum field strength of 70 dB/u, or 3.16 mV/m or greater, over the entire "principal community" to be served, and precedent has repeatedly held that 70 dB/u coverage of 80% of the residential area of a "principal community" constitutes "substantial compliance" with this provision. *See, e.g., Barry Skidelsky*, 7 FCC Rcd 1, 10 (Rev. Bd. 1992); *New Song Communications, Inc.*, 5 FCC Rcd 3949 (M.M. Bur. 1990). Further, 47 CFR § 73.313 ("Prediction

of Coverage") sets forth the Commission's "standard prediction" methodology for determining whether or not the "principal community" coverage requirement has been met. Here, the ALJ found that all parties (including the Bureau) are in agreement that using this "standard prediction" methodology, both applicants' technical proposals would meet the requirements of 47 CFR § 73.315(a) for predicted coverage of Honolulu. I.D., para. 12. KMKP proposes a transmitter site on Palikea Peak, and RRI proposes its site on the Wiliwilinui Range.[1]

7. However, there is a dispute between the parties as to what land area comprises "Honolulu." RRI argues that Honolulu should be defined as co-extensive with that portion of the island of Oahu referred to variously as the "Judicial District," the "Honolulu District" and "Honolulu" as defined by the United States Postal Service, *but excluding* certain outlying islands. More specifically, claims RRI, Honolulu should be defined as that part of the Island of Oahu between Moanalua to Maunalua; or the "urban area" of Honolulu (which includes downtown Honolulu and Waikiki); or essentially that area styled as the "Honolulu District." RRI Exh. 6, at Exh. G. Raymond R. Pau, the City Clerk of the City and County of Honolulu, stated on behalf of RRI that the area described above is "generally" regarded as the city of Honolulu, Hawaii (RRI Exh. 6, at Exh. G); and Robert C. Schmitt, the State Statistician and Chief of the Statistics Branch in the Hawaii State Department of Business, Economic Development and Tourism, also on behalf of RRI, stated that the City of Honolulu, "for statistical purposes," is coterminus with the "Honolulu District." RRI Exh. 6, at Exh. N. However, according to KMKP, the area thus described is comprised of only 225 square kilometers, with a population of only 365,048 persons. KMKP Reply Exceptions at p. 8. For its part, KMKP urges the adoption of the "legal definition" of Honolulu, which describes Honolulu as consisting of the entire island of Oahu and certain northwestern islands, all of which are under the jurisdiction of a single mayor and city counsel. KMKP Exh. 10, at 3. KMKP supplied evidence that the *Revised Charter of the City and County of Honolulu of 1973* (1984 ed.) provides, in Section 1-102, that "the Island of Oahu and all other islands in the State of Hawaii, not included in any other county and the waters adjacent thereto, shall constitute the City and County of Honolulu." *Id.*, at 5. The "Honolulu" area thus described by KMKP is comprised of 1,545 square kilometers, with a much larger population of 762,565 persons. In the end, however, the ALJ concluded that "it matters not which definition is adopted, that is, the legal definition or the so-called traditional definition of Honolulu, Hawaii, since both applicants propose a broadcast service which meets the requirements of Section 73.315(a) of the Commission rules." I.D. at para. 11.

8. The second prong of the remaining dispute between the parties relates to the type of engineering study which should be utilized to predict coverage. Thus, whereas the Commission's "standard prediction" methodology set forth in 47 CFR § 73.313 allows for terrain obstruction and resultant shadowing,[2] both applicants, in responding to Issue [3], introduced supplemental studies from their engineers which were designed to "adjust" the coverage determined by the "standard prediction" method to account for terrain to a greater extent than contemplated by the aforementioned "standard prediction" method. I.D. at para. 13.

9. At hearing, RRI presented the testimony of Norwood R. Patterson, an engineer and principal of RRI. Patterson used three separate methods for predicting the coverage to be expected from the proposals, taking terrain into account: (1) the Commission's "F (50, 50)" curves; (2) the "Tech Note NBS 101" method; and, finally, (3) a variation of the "Tech Note NBS 101" method (or the so-called "Grid File" method). RRI Exh. 8 at 5. KMKP's engineer prepared his study (at the request of all of the applicants whose applications were still pending at the time),[3] with the conspicuous exception of RRI. He analyzed the signal propagation characteristics from what he considered to be the "worst case" proposal then-present in this proceeding, using two methods which he claims are all sensitive to terrain: (1) the "free space less obstruction loss prediction method," based on the method outlined in "Tech Note NBS 101," and (2) the "Adjusted F (50, 50)" method, which employs obstruction loss adjustments to the Commission's own "F (50, 50)" curves. KMKP Exh. 11 at 9-10. Moreover, rather than using eight evenly spaced radials (and one through the community of license) as required by 47 CFR § 73.313, RRI ran radials every two degrees, and KMKP ran radials at every degree. Nonetheless, the Bureau posits that those supplemental showings are not necessarily more reliable, additionally noting that each utilized entirely different systems of estimating population (which each respectively attacks as less accurate). The Bureau claims that the only truly accurate measurement of population (other than the *estimates* utilized here) is an actual "head count" (which neither applicant has employed).[4]

DISCUSSION

10. RRI concedes that if KMKP is not found technically disqualified, it cannot prevail in this proceeding. RRI likewise concedes: "There has *never* been any dispute that the standard prediction methodology shows that each applicant satisfies the requirements of Section 73.315(a)." RRI Exceptions at para. 40 (emphasis added). However, for the Board to determine that KMKP is absolutely disqualified we must simultaneously find (exactly as the Bureau states in its Reply at 8) *all* of the following: (1) the "standard prediction method" set forth in 47 CFR § 73.313 is not appropriately applied in this proceeding; (2) at least one of RRI's three "alternative" engineering studies is, conversely, *both* reliable and applicable here; (3) the *only* definition of the subject "community of license" is that postulated by RRI (*i.e.*, coterminous with the "Judicial District," *but excluding* certain off-shore islands), and not the "legal definition" of Honolulu; and (4) that, in any event, KMKP is not entitled to a waiver of 47 CFR § 73.315.

11. The Board finds unpersuasive RRI's argument that its "alternative" engineering studies are more reliable here than the "standard prediction" method specified in 47 CFR § 73.313, a method that inherently includes provisions for compensating for terrain roughness. The three RRI "alternative" studies, based on RRI's own idiosyncratic assumptions of prediction of coverage (1) to *only* the "judicial district" and (2) a uniform population distribution within certain "census tracts," do reflect varying degrees of coverage utilizing various assumptions.[5] But, with respect to RRI's unilateral contention that the "judicial district" depiction of Honolulu *must* be used here, we agree with the Bureau that the Commission has never found that this definition of Honolulu is either applicable

or exclusive in determining that city's coverage, and RRI has cited no precedent whatsoever in support of its curious claim.[6] Further, we fail to see that any public interest benefit would be served by adopting such a crabbed definition of Honolulu, with service to be provided to fewer than half the number of persons residing within the "legal definition" of the "principal city." It is true that, while "alternative" *supplemental* engineering studies (*e. g.*, "Tech Note NBS 101")[7] may be submitted, *see generally Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3949-4951 (Rev. Bd. 1988), *recon. denied*, 3 FCC Rcd 5631 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5561 (1990); *Apogee Broadcasting Corp.*, 100 FCC 2d 602, 604 (1985), the disparities between the supplemental studies submitted here are insufficient to disprove the applicability or reliability of the "standard prediction" provisions of 47 CFR § 73.313. *Compare, e. g., Washoe Shoshone* (failure of proof that "standard prediction" methodology is "materially inaccurate or otherwise inapplicable" in television proceeding). Further, as the Bureau notes (Reply at paras. 17-18):

> The fact is that the evidence regarding the effect of shadowing in the instant case is inconclusive. Furthermore, that evidence, which is supplemental to the coverage data calculated under the standard prediction method, does not point to a significantly different result than ensues from use of the standard prediction method. Under such circumstances, disqualification of an applicant for failure to meet city-grade coverage requirements is not warranted. Both applicants should be found qualified.
>
> Even if it could be concluded on the basis of this record that city-grade coverage will not be achieved by either or both applicants, a waiver would be appropriate. The record is clear that the Honolulu area contains irregular terrain. Further, there are limitations on site location imposed by the FCC Monitoring Station and the Federal Aviation Administration. RRI Ex. 7, at p. 2. Moreover, the signal shortfall here, if any, is very small and the result of terrain obstructions. *Compare Naguabo Broadcasting Company*, 6 FCC Rcd 912 (Rev. Bd. 1991). There is no question regarding compliance with the city-grade coverage rules using standard prediction methods. *Compare Channel 32 Broadcasting Company*, 5 FCC Rcd 7373, 7374 (Rev. Bd. 1990). Finally, we believe that city-grade coverage waivers, unlike spacing waivers, can be granted to one applicant even if another applicant is deemed to be in compliance. While the existence of fully spaced sites may be relevant as a public interest factor, it is not dispositive. *Compare Millard Orick, Jr.*, 89 FCC 2d 571 (Rev. Bd. 1982) *with dicta* in *Vela Broadcasting Co.*, 2 FCC Rcd 3663, 3665-66 (Rev. Bd. 1987), and reference to *de minimis* waivers in *Channel 32 Broadcasting Company, supra*, at 7375. Here, where the coverage shortfall is not significant and well established and where it is not apparent under standard prediction methods, the public interest would clearly favor a waiver.

The Board concurs as well with these Bureau assessments, and concludes that there is simply a lack of persuasive evidence in this proceeding upon which to absolutely *disqualify* KMKP on technical grounds. Ergo, because RRI has not excepted to the ALJ's determination that KMKP is the superior applicant on a comparative basis, *see Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), the I.D. is affirmed.

12. ACCORDINGLY, IT IS ORDERED, That the request for oral argument filed by Kasa Moku Ka Pawa Broadcasting, Inc., in its Reply Exceptions, May 19, 1992, and the request for oral argument filed by Radio Representatives, Inc., on May 26, 1992 ARE DENIED; and that the Motion to Strike filed by Radio Representatives, Inc., on June 11, 1992 IS DENIED; and,

13. IT IS FURTHER ORDERED, That the application of Radio Representatives, Inc. (File No. BPH-870910MD) IS DENIED, and the application of Kasa Moku Ka Pawa Broadcasting, Inc. (File No. BPH-870910MZ) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] KMKP claims that its proposed site is already utilized by existing licensees (Reply Exceptions at n. 1), and that in a recent proceeding, *Scott Gerard Mahalick*, 2 FCC Rcd 1635 (1987)(*Hearing Designation Order*), in which RRI was a party, the construction permit was eventually awarded to a permittee which proposed to serve "Honolulu," and a waiver of 47 CFR § 73.315 was ultimately granted there. Reply Exceptions at 3, 14.

[2] *See* 47 CFR § 73.313(d)(3), (e), (f), (g), and (h).

[3] A total of ten competing applications were originally designated for hearing. In addition to KMKP and RRI, three other applicants remained viable at the time Issue [3] was added to this proceeding.

[4] FCC Form 301, Section V-B, Question 17 requires the disclosure of estimated population served, using latest U.S. Census data. *See also* 47 CFR §73.315(c). As the Bureau also notes, whereas KMKP assumed "uniform distribution" in calculating population (a "long-standing" method recognized by the Commission), RRI preferred to rely upon "census tracts" to estimate various population figures.

[5] Both RRI and KMKP submitted supplemental showings. RRI's "alternative" studies demonstrated the following (Bureau Reply at p. 5):

	RRI	
	Area	Population
F (50, 50)	83.6%	88.6%
Tech Note 101	83.1%	89.8%
Grid File	87.4%	89.2%
	KKMP	
	Area	Population
F (50, 50)	48.7%	71.3%
Tech Note 101	42.9%	78.4%
Grid File	48.4%	73.3%

For its part, KMKP submitted two "alternative" studies to calculate predicted coverage. One study utilized a "Tech Note 101" method, and the other employed "obstruction loss adjust-

ments" to the F (50, 50) curves. Separate studies for both the "judicial district" and the "legal definition" of Honolulu were offered by KMKP (Bureau Reply, at p. 6):

RRI "Judicial District"

	Area	Population
Tech Note 101	76%	76%
F (50, 50)	67%	67%

RRI "Legal Definition"

	Area	Population
Tech Note 101	50%	78%
F (50, 50)	37%	65%

KKMP "Judicial District"

	Area	Population
Tech Note 101	64%	64%
F (50, 50)	49%	49%

KKMP "Legal Definition"

	Area	Population
Tech Note 101	60%	63%
F (50, 50)	51%	57%

KMKP thus claims that neither it nor RRI provides the requisite 70 dB/u (or greater) coverage over 80% of the land area or population of Honolulu (whether "Honolulu" is defined by either the "legal definition" or by the "judicial district"), when "alternative" calculations of predicted coverage are considered. KMKP Reply at p. 9. KMKP further argues (*id.*, at pps. 9-10):

> Significantly, RRI must concede that, using any terrain-sensitive method other than the standard prediction method (which does incorporate terrain sensitivity) neither applicant provides a predicted 70 dBu or better coverage to both the land area and the population of the City of Honolulu as defined by the *Revised Charter of the City & County of Honolulu*. Moreover, there is substantial evidence to the effect that, with respect to the Judicial District, when a methodology giving greater effect to terrain than the F(50,50) curves is used, neither applicant provides a 70 dB or better signal over 80% or more of the area within the Judicial District, when the census figures for area and population are used. Using RRI's own figures for area served with RRI's 70 dB signal (173.96 sq. km.) and applying the census figures of 225 square kilometers (87 square miles) for the area of the Judicial District, the result is 77% for RRI, which is less than the 80% benchmark. With respect to population, using the recognized uniform distribution of population approach, neither applicant shows 70 dB or better coverage to 80% or more of the population, regardless of how the City of Honolulu is defined, if the standard Commission prediction method is not employed.
>
> The only supportable conclusion, after reviewing all of engineering testimony regarding the "city grade coverage" issue in the case, is that either (i) both applicants satisfied Section 73.315 of the Commission's Rules by using the standard prediction method, or (ii) neither of the applicants achieves a 70 dBu or better coverage over 80% or more of both the land area and the population of the City of Honolulu as defined by the *City Charter*, or as defined by the Judicial District.

[6] RRI also seeks (Exceptions at 8) to discredit KMKP's definition of Honolulu by asserting that other communities within the "legal definition" of Honolulu (*e. g.*, Pearl City, Kailua, Kaneohe, Aiea, Maunawili, and Waipahu) have been separately licensed, and that therefore "KMKP's attempt to create 'communities,' *e. g.*, Pearl City, within other communities, *e. g.*, the County and City of Honolulu, finds no support in the language or history of Section 307(b) of the Communications Act or the Commission's effectuation of this mandate." *Id.* However, we note that the Commission will accept for individual licensing services some relatively flexible definitions of separate communities of license. *See , e. g., Sunshine Broadcasting, Inc.*, 2 FCC Rcd 7559, 7560 (1987), *aff' d mem. sub nom. L. B. C., Inc. v. FCC*, 865 F.2d 1329 (D.C. Cir. 1989); *Beacon Broadcasting*, 104 FCC 2d 808 (Rev. Bd. 1986), *modified on review*, 2 FCC Rcd 3469 (1987), *recon. denied*, 2 FCC Rcd 7562 (1987), *aff' d sub nom. New South Broadcasting* Corp. v. FCC, 879 F.2d 867 (D.C. Cir. 1989). That does not mean, however, that such acceptance *precludes* any other definition, and RRI shows no precedent for such preclusion. In fact, this historical flexibility in defining exactly what constitutes a separate "community of license" for initial licensing purposes sharply undercuts RRI's thesis here. *Cf. Miners Broadcasting Service, Inc. v. FCC*, 349 F.2d 199 (D.C. Cir. 1965).

[7] *See Technical Note 101, "Transmission Loss Predictions For Tropospheric Communications Circuits,"* by P.L. Rice, A.G. Langley, K.A. Norton, and A.P. Borisi, published by the U.S. Department of Commerce, National Bureau of Standards (revised January 1, 1967). 47 CFR § 73.313(e) provides:

> In cases where the terrain in one or more directions from the antenna site departs widely from the average elevation of the 3 to 16 kilometer section, the prediction method may indicate contour distances that are different from what may be expected in practice. For example, a mountain ridge may indicate the practical limit of service although the prediction method may indicate otherwise. In such cases, the prediction method should be followed, but a supplemental showing may be made concerning the contour distances as determined by other means. Such supplemental showings should describe the procedure used and should include sample calculations. Maps of predicted coverage should include both the coverage as predicted by the regular method and as predicted by a supplemental method. When measurements of area are required, these should include the area obtained by the regular prediction method and the area obtained by the supplemental method . . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
August 17, 1992

Released: August 21, 1992

8310-HTS
92060167
92070476

Zapis Communications Corporation
Licensee, Radio Station WAAF(FM)
1729 Superior Avenue
Cleveland, OH 44114
Attn: Mr. Xenophon Zapis, President

Dear Licensee:

This is a Notice of Apparent Liability for a forfeiture of five thousand dollars ($5,000) pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On June 16, 1992, the Commission sent you a letter of inquiry concerning a complaint we had received alleging that on June 1, 1992, Station WAAF(FM), Worcester, Massachusetts, had broadcast a telephone conversation without the party's knowledge in violation of Section 73.1206 of the Commission's Rules.

On July 16, 1992, we received your response in which you admitted that your disc jockey aired the phone call and had not first informed the party being called of the intended broadcast use of the conversation. You explained, however, that by airing the conversation, your disc jockey had also violated the station's own policy and procedure, and that you have reprimanded her for that breach.

We find that your disc jockey's actions violated Section 73.1206 of the Commission's Rules, which prohibits the broadcast of a telephone conversation without first notifying the other party that the call is being recorded for broadcast or broadcast live. Although you explain that your disc jockey's actions violated station policy, we hold you responsible for your employee's actions and cannot excuse the violation. Accordingly, you are hereby advised of your apparent liability for a total forfeiture of five thousand dollars ($5,000) for your apparent willful violation of Section 73.1206 of the Commission's Rules on June 1, 1992.

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *reconsideration denied, Memorandum Opinion and Order*, FCC 92-212, released June 4, 1992. Under these standards, five thousand dollars ($5,000) is the base forfeiture for a violation of the telephone conversation broadcast rule.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-86

In re Applications of

WILLIAM F. PEEL, JR.	File No. BPH-890906MM
MINORITY BROADCASTING GROUP LIMITED	File No. BPH-890914MT
KAREN M. LOWERY	File No. BPH-890914MU
SEA OAKS BROADCASTING	File No. BPH-890914ND
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-890914NF
WHITE CITY BROADCASTING, INC.	File No. BPH-890914NP
HEATHER WILLSON CASS	File No. BPH-890914NW
MIDWAY BROADCASTING COMPANY	File No. BPH-890914OD

For Construction Permit for a
New FM Station on Channel 284A
White City, Florida

ORDER

Adopted: August 31, 1992; Released: September 18, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE.

1. The *Initial Decision*, 7 FCC Rcd 3286, of Administrative Law Judge Walter C. Miller in the captioned proceeding was released on May 29, 1992. The following parties, whose applications were denied therein, have failed to file exceptions to the *Initial Decision:* William F. Peel, Jr.; Minority Broadcasting Group Limited; and Sea Oaks Broadcasting. Their applications will therefore be dismissed for failure to prosecute pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR § 1.276(f).

2. ACCORDINGLY, IT IS ORDERED That the applications of William F. Peel, Jr. (File No. BPH-890906MM); Minority Broadcasting Group Limited (File No. BPH-890914MT); and Sea Oaks Broadcasting (File No. BPH-890914ND) ARE DISMISSED with prejudice.[1]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

[1] This order renders moot William F. Peel, Jr.'s motion to dismiss filed June 15, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Pinelands, Inc.
(Transferor)

and File No. BTCCT-920514KE

BHC Communications, Inc.
(Transferee)

For Transfer of Control of
WWOR-TV, Inc., Licensee of
WWOR-TV, Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: August 18, 1992; Released: August 21, 1992

By the Commission: Commissioner Duggan concuring with a statement.

1. The Commission has before it an application for consent to the transfer of control of WWOR-TV, Inc. (WWOR), licensee of station WWOR-TV, channel 9 (Ind.), Secaucus, New Jersey, from Pinelands, Inc. (Pinelands) to BHC Communications, Inc. (BHC). Because a cognizable shareholder of the parent company of BHC, Mario J. Gabelli, also is a director and 20 percent shareholder of both West-Land Communicators, Inc. (West-Land), licensee of WXPS(FM), Briarcliff Manor, New York, and of Rockland Communicators, Inc. (Rockland), licensee of WRKL(AM), New City, New York, BHC seeks a waiver of Section 73.3555(b)(1) and (2) of the Commission's Rules, the one-to-a-market rule.[1] Garden State Broadcasting Limited Partnership (Garden State) filed a petition to deny, Pinelands and BHC filed separate Oppositions, and Garden State filed a Reply.[2]

BACKGROUND

2. WWOR is a wholly owned subsidiary of Pinelands Broadcasting, Inc., which is wholly owned by Pinelands. By a unanimous vote, the Board of Directors of Pinelands approved a merger agreement and tender offer for all outstanding shares of Pinelands common stock from BHC Acquisition Corp., wholly owned by BHC, 95.2 percent of whose voting stock is held by Chris-Craft Industries, Inc. (Chris-Craft).[3] Tendering shareholders will receive $18 per share contingent upon several conditions, the minimum condition being that more than 50 percent of the outstanding shares are acquired. In addition, the merger agreement requires payment of interest at the rate of six percent per annum if the offer has not been consummated by July 12, 1992.

3. Garden State's interest in this proceeding stems from its 1987 filing of a competing application for a construction permit for a new television station to operate on channel 9, Secaucus, which was mutually exclusive with the application for renewal of WWOR-TV, filed by WWOR, then a subsidiary of MCA, Inc. (MCA). Although WWOR initially challenged the propriety of Garden State's application, the parties later submitted a settlement agreement to the Administrative Law Judge (ALJ) presiding over the comparative proceeding. The settlement was ultimately denied by the ALJ, *WWOR-TV, Inc.*, 6 F.C.C. Rcd 4350 (1991), who found that Garden State had filed its application for the improper purpose of reaching a settlement. Consequently, the ALJ denied the settlement agreement and Garden State's application, and granted WWOR's renewal application. *Id.* The Commission affirmed that action and denied Garden State's two additional petitions to enlarge issues regarding WWOR's qualifications. *WWOR-TV, Inc.*, 7 F.C.C. Rcd 636 (1992). In the meantime, the Commission had approved the *pro forma* transfer of control of WWOR from MCA to Pinelands, a transaction triggered by the acquisition of MCA by Matsushita Electrical Industrial Company, Ltd., a Japanese company, whose continued ownership of MCA's WWOR-TV would have violated Section 310(b) of the Act. *WWOR-TV, Inc.*, 6 F.C.C. Rcd 193 (1990), *recon. denied*, 6 F.C.C. Rcd 6569 (1991). That transfer was granted over the objection of Garden State, among others. Garden State filed a Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit in January 1991, with regard to the Commission order approving the *pro forma* Pinelands acquisition, and another in February 1992, with regard to the Commission grant of WWOR's renewal application. The appeals are pending. *Garden State Broadcasting Limited Partnership v. F.C.C.*, D.C. Cir. No. 92-1065 (filed Feb. 4, 1992); *Garden State Broadcasting Limited Partnership v. F.C.C.*, D.C. Cir. No. 91-1043 (filed Jan. 24, 1991).

4. In the transfer application before us, as initially filed, Pinelands and BHC indicated that, in addition to the 13.62 percent voting interest in Pinelands,[4] the 12.1 percent voting interest in Chris-Craft, parent company of BHC,

[1] The one-to-a-market rule generally proscribes common ownership of a television station and a radio station in the same market.

[2] Whitely Communications (Whitely) filed a pleading captioned "Request for Investigation and Stay" on June 29, 1992. Unsupported by affidavit, the pleading alleges an unauthorized transfer of control of Pinelands to The Walt Disney Company as a result of their merger negotiations, which preceded the tender offer by BHC. We deny Whitely's request for investigation, because it is based solely on speculation, and its request for a stay, because it fails to establish any of the four elements required to support a stay. *See, e.g., Macfadden Acquisition Corp.*, 60 R.R. 2d 872, 882 (1986).

[3] Chris-Craft controls the licensees of: KMSP-TV, Minneapolis, Minnesota; KTVX(TV), Salt Lake City, Utah; KUTP(TV), Phoenix, Arizona; KBHK-TV, San Francisco, California; KMOL-TV, San Antonio, Texas; KPTV(TV), Portland, Oregon; and KCOP(TV), Los Angeles, California.

[4] A July 23, 1992 Pinelands amendment indicates that Gabelli's interest in Pinelands declined to 4.71 percent, a nonattributable interest because it falls below the five percent benchmark. However, we note that this reduction does not affect our decision in this case.

and the 20 percent interest in West-Land and Rockland held by Gabelli and his associated entities, Gabelli is Chairman of the Board and Chief Executive Officer of Lynch Corporation, whose wholly owned subsidiary, Lynch Entertainment Corporation, is general partner and 20 percent owner of Coronet Communications Company, licensee of television station WHBF-TV, Rock Island, Illinois. However, the applicants filed amendments to their application, reporting that Gabelli only recently informed Pinelands and BHC that he and the various entities which he directly or indirectly controls, and for which he acts as chief investment advisor,[5] have noncontrolling but attributable ownership interests beyond the interests initially noted on the transfer application.[6]

5. These recently disclosed interests, Pinelands and BHC readily acknowledge in their June 12 amendment, violate numerous subsections of our multiple ownership rule, Section 73.3555, as well as Section 613 of the Act, as implemented in Section 76.501(a)(2) of the Rules, which prohibits the ownership of a cable system operating within the Grade B contour of a commonly owned television station. Specifically, Pinelands and BHC note that: (1) Gabelli has an attributable interest in as many as 27 television stations, a violation of Section 73.3555(d);[7] (2) the Grade B contour of Paramount's WTXF-TV, Philadelphia, overlaps with that of WWOR-TV, in violation of Section 73.3555(a)(3), the contour-overlap rule; (3) Paramount's KRRT(TV), Kerrville, Texas, serves substantially the same area as Chris-Craft's KMOL-TV, San Antonio, Texas, also a violation of the contour-overlap rule; and (4) the cable systems of Hector Communications's subsidiary serves communities within the predicted Grade B contour of Chris-Craft's KMSP-TV, St. Paul, Minnesota, a violation of Section 613 of the Act and Section 76.501(a)(2) of the Rules.[8] BHC seeks waiver of only our one-to-a-market rule, with regard to WWOR-TV, WXPS(FM) and WRKL(AM), stations in which Gabelli's interests were known by BHC at the time this transfer application was filed with the Commission.

6. Gabelli holds impermissible interests in various licensees unrelated to the parties here. We will, however, proceed to consider the instant proposal, including the effect on the applicants' qualifications of the failure to report timely and fully Gabelli's media holdings. At the same time, we are also initiating a separate show cause proceeding to resolve Gabelli's apparent multiple-and cross-ownership violations, as described in paragraph 31 below.

7. With regard to the Pinelands-BHC merger, Garden State raises two principal arguments against grant of the instant application for transfer of control, one procedural and one substantive. First, Garden State contends that the Commission may not grant the transfer application until the comparative renewal proceeding involving Garden state and WWOR, as well as the *pro forma* MCA-Pinelands transfer, are no longer subject to judicial review. Second,

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[5] Pinelands and BHC readily acknowledge that because GAMCO Investors, Inc. and Gabelli Funds, Inc., which, they state, hold all but a small fraction of the Gabelli interests cited, are investment advisors, they are subject to the five percent attribution benchmark rather than the 10 percent benchmark for passive investors. *Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Attribution)*, 97 F.C.C. 2d 997, 1012-17 (1984), *recon. granted*, 58 R.R. 2d 604 (1985), *further recon.*, 1 F.C.C. Rcd 802 (1986).

[6] According to the various amendments, those interests are: (1) 18.5 percent (through various subsidiaries) in Chris-Craft; (2) 40 percent in Lynch Corporation, in addition to Gabelli's roles as chairman of the board and chief executive officer; (3) 5.59 percent in Associated Communications, licensee of WRKY(FM)/WSTV(AM), Steubenville, Ohio; (4) 22.02 percent in Hector Communications, parent company of Pine Island Telephone Co., which owns and operates cable systems in Pine Island and Oronoco, Minnesota; (5) 9.91 percent of the voting stock of Liberty Corporation (Cosmos Broadcasting), licensee of WSFA(TV), Montgomery, Alabama, KAIT-TV, Jonesboro, Arkansas, WFIE-TV, Evansville, Indiana, WAVE(TV), Louisville, Kentucky, KPLC-TV, Lake Charles, Louisiana, WTOL-TV, Toledo, Ohio, and WIS(TV), Columbia, South Carolina; (6)9.73 percent voting share as to the election of directors (greater for other matters) of Media General, licensee of WJKS(TV), Jacksonville, Florida, WFLA-TV, Tampa, Florida, and WCBD-TV, Charleston, South Carolina; parent company of Cablevision of Fredericksburg (Virginia), Inc., and Media General Cable of Fairfax (Virginia), Inc.; parent company of Garden State Newspapers, Inc., publisher of 11 daily newspapers; parent company of North Jersey Newspaper Co., publisher of one daily newspaper; and publisher of six newspapers in Florida, North Carolina and Virginia; (7)13.36 percent in Outlet Communications, licensee of WCMH(TV), Columbus, Ohio, and WJAR(TV), Providence, Rhode Island; and (8) 5.75 percent (through various subsidiaries) in Paramount Communications, licensee of WDCA-TV, Washington, D.C., WLFL-TV, Raleigh, North Carolina, WTXF-TV, Philadelphia, Pennsylvania, KTXA(TV), Fort Worth, Texas, KTXH(TV), Houston, Texas, and KRRT(TV), Kerrville, Texas.

[7] Although the June 12 amendment includes 27 television stations in which Gabelli has a cognizable interest, Pinelands and BHC attempt to eliminate interests in five of those stations by analogizing the shareholder voting structure of Media General, Inc. and Outlet Communications, Inc. to the single majority shareholder exception in Note 2(b) to Section 73.3555. Alternatively, the applicants suggest, relying on *Attribution*, 97 F.C.C. 2d at 1011, that the Gabelli interests in these corporations are nonattributable because "another person (or persons) is in indisputable control of the licensee." Pinelands and BHC also attempt to eliminate several other Gabelli interests by anticipating the outcome of two of our proposed rulemakings: in MM Docket 92-51, in which the Commission proposes to raise the attribution benchmark for nonpassive investors to 10 percent, and in MM Docket 91-221, in which the Commission proposes to increase national ownership of television stations. Reliance on these rulemakings is premature. *See Beaufort County Broadcasting Co. v. F.C.C.*, 787 F.2d 645, 649 n.2 (D.C. Cir. 1986)("Petitioner's objection comes down to the claim that it was entitled to the benefit of a policy not yet adopted. That contention is frivolous."). Further, we decline to address these arguments until we have obtained a full accounting from Gabelli of his media holdings, as discussed below.

[8] Pinelands and BHC also note that Media General, in which Gabelli has an attributable interest, publishes a number of newspapers in northern New Jersey which "serve areas" within the Grade B contour of WWOR-TV. If true, there would be no violation of the newspaper-broadcast cross-ownership prohibition, Section 73.3555(c)(3), which bans the ownership of a newspaper published in a community which is entirely encompassed by the Grade A contour of a commonly owned television station. Garden State, on the other hand, claims that the Grade A contour of WWOR-TV overlaps much of New Jersey, where Media General publishes 12 daily newspapers, thereby intimating possible violation of the cross-ownership rule. As discussed below, we will determine the existing violations upon full disclosure of Gabelli's interests and act upon them at that time.

Garden State argues that the recently Pinelands's qualifications with regard to misrepresentation and failure to report those interests and resulting violations. Accordingly, Garden State concludes that several issues must be specified against both Pinelands and BHC, thereby deferring grant of the instant application until those issues are resolved.

PROCEDURAL MATTERS

Deferral of Commission Action

8. Citing Commission policy and precedent, as well as the Communications Act, Garden State argues that we are barred from granting this application for transfer of control pending a "final result" in the comparative renewal proceeding between WWOR and Garden State. First, Garden State asserts that the Commission's 1973 *Questions Concerning Basic Qualifications of Broadcast Applicants (Basic Qualifications)*, 28 R. R. 2d 705 (1973), now prohibits us from granting the transfer application. *Basic Qualifications* provides for deferral of action on transfer applications, based on separate criteria with regard to the prospective seller and purchaser: where the prospective seller is involved in a pending renewal, revocation or investigative proceeding regarding the particular station to be sold, *id.* at 706, or where the prospective purchaser is involved in a license renewal, revocation, or a pending criminal proceeding, and there remain unresolved questions of basic character qualifications. *Id.* at 705. Therefore, Garden State argues, because WWOR's renewal application is "pending," defined by Section 1.65(a) as no longer subject to "review by any court," and because the pending renewal also challenges the basic character qualifications of WWOR, the guidelines apply with even greater force to the instant application.

9. Second, according to Garden State, the Commission's application of *Basic Qualifications* in this case is more compelling than the circumstances presented in *RKO General, Inc.*, 64 F.C.C. 2d 713 (1977), which involved a *pro forma* transfer of control from the parent company to the individual shareholders. In that case, we deferred action on the transfer where a comparative renewal proceeding and concomitant petition to enlarge issues as to the licensee's misconduct remained pending before the Commission. Here, Garden State argues, like the competing applicant in *RKO General, Inc.*, it filed petitions to enlarge issues based on the conduct of the licensee in the renewal proceeding and intends to argue against the Commission's denial of those petitions before the Court of Appeals. However, Garden State notes, the substantial change in control of Pinelands, unlike the *pro forma* transfer in *RKO General, Inc.*, would result in a reconstituted board of directors and set of officers and would leave only one former Pinelands attributable shareholder, Gabelli, with an interest in WWOR-TV. This change, according to Garden State, would create greater possible disruption and prejudice to Garden State than would have been experienced by the competing applicants in *RKO General, Inc.*, where the shareholders and management remained unchanged. Consequently, Garden State contends, Commission grant of the transfer of WWOR to BHC would hinder Garden State and the Commission from trying issues regarding the conduct of Pinelands, whose principals will have received a "financial windfall" and will no longer be subject to Commission jurisdiction. Additionally, according to Garden State, the Court of Appeals would be hampered in redressing any errors it may find in the renewal proceeding. In sum, notes Garden State, Commission grant of the transfer to BHC would "eviscerate" its right to meaningful judicial review.

10. Third, Garden State argues that while its appeal of the renewal proceeding is pending, not only is the Commission unable to make the public interest finding required by Section 310(d) of the Act, with regard to the Pinelands-BHC transfer application, it is similarly unable to make the public interest finding required by 307(c), with regard to WWOR-TV's renewal application. Further, Garden State maintains that the hearing requirement of Section 309(e), as interpreted by the U.S. Supreme Court in *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327 (1945), also prohibits Commission grant of the transfer while the renewal proceeding is pending. The Court held in *Ashbacker* that the grant of one of two mutually exclusive applications without a hearing to both deprives the other of a statutory opportunity to be heard. Inherent in *Ashbacker*, according to Garden State, is the requirement that a competing applicant such as Garden State have a full opportunity to challenge and to probe the qualifications of, as well as be compared with, its mutually exclusive opponent. According to Garden State, that opponent is Pinelands, not BHC.

11. Finally, Garden State asserts that because Pinelands has not secured a final grant of its renewal application, it has no license to transfer to BHC. Relying on the principle of *Jefferson Radio Co., Inc. v. F.C.C.*, 340 F.2d 781 (1964), as stated in *Jack O. Gross*, 31 F.C.C. 2d 226, 228 (1971), Garden State notes that BHC has "nothing to assign until the existing authorization has been extended."

12. *Discussion.* As early as *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134,138 (1940), the U.S. Supreme Court recognized that the Communications Act endowed the Commission with the flexibility of procedure, consistent with the public interest, so long as due process is accorded to the private interests of applicants. Thus, as Garden State correctly observes, the Commission in 1973, in *Basic Qualifications*, adopted guidelines for deferring action on transfer applications when the station's license renewal is pending. This policy was intended to apply only to proceedings pending before the Commission, however, as elucidated by application of that policy in the case cited by Garden State, *RKO General, Inc.*, 64 F.C.C. 2d at 718. There, action on the transfer application was deferred "at least until we are able to determine whether further exploration of [the transferor's] activities in this evidentiary hearing is necessary."[9] Indeed, all past cases invoking *Basic Qualifications* as the basis for

[9] Garden State's focus on the Commission's concern in *RKO General, Inc.*, 64 F.C.C. 2d at 718, that action on the transfer "could seriously encumber our regulatory functions," serves to support our practice of deferral only in instances where proceedings are pending before the Commission. Moreover, Garden State's observation that the Commission was unable in *RKO General, Inc.* to make the requisite Section 310(d) public interest finding with respect to the transfer application because of the unresolved questions of conduct is further support for not deferring the instant application. We are free in the case before

deferred action clearly involved proceedings pending before the Commission, not before a court, as is the situation here.[10] *See, e.g., RKO General Inc.*, 82 F.C.C. 2d 291 (1980); *Grayson Enterprises, Inc.*, 46 R.R. 2d 1574, *recon. granted*, 79 F.C.C. 2d 936 (1980); *Boise Valley Broadcasters, Inc.*, 53 F.C.C. 2d 823 (1975).[11] Consequently, we find that the guidelines of *Basic Qualifications* are inapposite to the instant proceeding.[12]

13. There is no specific language in the Communications Act which requires the strict maintenance of the status quo pending disposition of an appeal, even as among the parties to that appeal. *Evans v. F.C.C.*, 113 F.2d 166, 169 (1940);[13] *see also Committee to Save WEAM v. F.C.C.*, 808 F.2d 113,119 (1986)(Bureau procedure "merely prevented appellant from insisting on the maintenance of the status quo pending review"). Yet, the Act contains protections for a competing applicant, such as Garden State, in that our grant of WWOR's renewal application, as with any Commission action, is subject to limitations of the Act.[14] Most notable of these here is Section 402(h), which provides that in the event the court renders a decision reversing the Commission, it will remand the case to the Commission to carry out the court's judgment. Accordingly, Garden State's apprehensions, that our grant of the instant transfer application would preclude judicial review and potential legal redress in its appeal of WWOR's renewal, including an opportunity to exercise its *Ashbacker* rights,[15] should be assuaged in that its appeal would not be mooted by the substitution of BHC for the former Pinelands in the ownership of WWOR.[16] Although *Ashbacker* guarantees an applicant the opportunity to compete with other qualified mutually exclusive applicants for

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us to make such a finding now that the renewal proceeding has been finally decided by the Commission in favor of Pinelands. *See WWOR-TV, Inc.*, 7 F.C.C. Rcd 636 (1992).

[10] Garden State contends that a transfer of control cannot be approved while the station's renewal application is pending and notes that the WWOR-TV license renewal is "pending," as defined in Section 1.65 of the Rules. Section 1.65 is applicable to WWOR with regard to its duty to update its renewal application and its transfer application during the pendency of Garden State's appeal. The rule's definition of "pending," however, is limited by its terms to "the purposes of this section." The "purpose" of that section is to assure that we have on file current information as to matters that might be subject to further proceedings before the Commission or the courts. The limitation of the definition for 1.65 purposes clearly implies that an application may not be deemed "pending" for other purposes. In that regard, *Basic Qualifications* applies to different circumstances and addresses different public interest concerns. Specifically, it addresses our disposition of applications when we are unable to make the required public interest determination regarding a licensee's qualifications. We have made that determination in this case, and found WWOR fully qualified. For these reasons, we reject Garden State's attempt to apply Section 1.65's definition of "pending" to circumstances covered by *Basic Qualifications*.

[11] In *Boise Valley Broadcasters, Inc.*, 53 F.C.C. 2d at 824-25, we expressly distinguished between the circumstances warranting deferral, where basic character qualifications remained pending before the Commission, and those in which action on a transfer application could proceed, where "the Commission had already made a determination that [the applicant] possessed the requisite character qualifications to be a Commission licensee." Thus, it was understood early on that transfer applications were to be deferred only where issues of basic qualifications remained unresolved by the Commission.

[12] Relying on *Faith Center, Inc.*, 82 F.C.C. 2d 1, 40 (1980), Garden State contends that the Commission has "properly recognized that a renewal case is not completed until there is a final order." In that case, although we denied the renewal application of a licensee, we noted in an ordering clause that if the licensee sought reconsideration by the Commission or judicial review of the action, the licensee would be authorized to continue operation until 30 days after the forum which has jurisdiction to review that proceeding issued its mandate. We note that Section 307(c) of the Act provides that "[p]ending any hearing and final decision on [a renewal] application and the disposition of any petition for rehearing pursuant to section 405, the Commission shall continue such license in effect." The term "pending" is not defined in this sentence, which was added to Section 307(c) by Congress without comment. House Rep. No. 1750, 82d Cong., 2d Sess. 8 (1952). However, the Court of Appeals has noted that this "pending" provision of Section 307(c) and Section 558(c) of the Administrative Procedure Act, 5 U.S.C. §558(c), "share an identical purpose -- protection of licensees from the uncertainties stemming from protracted *administrative consideration.*" *Commission for Open Media v. F.C.C.*, 543 F.2d 861, 867 (1976)(emphasis added). This interpretation seems even more appropriate in light of Congress's express definition of "pending" in Section 311(c)(4) and (d)(4), which for purposes of only those subsections extends to "review by any court." Where Congress wished to expand the meaning of "pending" to include court appeals it expressly did so, and because Section 307(c) is silent as to the meaning, we interpret it as extending only to Commission decisions and not to court appeals. Although, as in *Faith Center*, we generally permit a disqualified licensee to continue operating during the pendency of court appeals, we do so as a matter of discretion, not as a requirement under the Communications Act or the Administrative Procedure Act. This policy ensures that there is continued broadcast service to the public until the licensee's qualifications are resolved by the court, a concern not present here.

[13] We relied on *Evans* in granting a licensee's renewal application and in denying a petitioner's request that such action be deferred pending the outcome of its court appeal against our action in the prior renewal period. *RadiOhio, Inc.*, 44 F.C.C. 2d 1119 (1973). Although in that case we focused on the deferral of a renewal rather than of a transfer, our denial of that deferral request, made within less than two months of the release of the *Basic Qualifications*, clearly indicates our objection to freezing Commission action while awaiting an appeal.

[14] Section 307(a) of the Act makes license grants from the Commission "subject to the limitations of this Act." One of those limitations, Section 402(b)(1), the right to appeal by an applicant for a construction permit whose application is denied, has already been exercised by Garden State. Yet, we disagree with Garden State's contention that the appeal stage is "not legally different than would be a post-initial decision, or post-Review Board stage in the proceeding." There is a clear demarcation between the Commission's administrative proceedings and judicial review of those proceedings.

[15] Of course, if the renewal proceeding is remanded, a comparative evaluation would occur only after determination that Garden State is basically qualified. *See, e.g., Louis Adelman*, 28 F.C.C. 2d 432 (1960); *aff'd sub. nom Guinan Realty Company v. F.C.C.*, 297 F.2d 782, 785 (D.C. Cir. 1961).

[16] Although Garden State's repeated concern regards its appeal of our grant of WWOR's renewal application, Garden State notes that its consolidated pending appeal of our grant of the earlier transfer from MCA to Pinelands also favors deferral of action on the instant application. Because the qualifications of Pinelands "are still in question," according to Garden State, Pinelands should not be allowed to sell the facility for full market value. Grant of the transfer application before us, Garden State notes, would "exhibit contempt for the Court of Appeals' authority to review Commission action" and would "foreclose the Court of Appeals from remedying any errors" it

a facility, it does not guarantee that the applicants it competes against will or must remain static. For example, in some circumstances, we have ordered a new applicant for a construction permit to be comparatively evaluated with a proposed assignee in lieu of the proposed assignor-renewal applicant. *See Cleveland Board of Education*, 87 F.C.C. 2d (1981); *1400 Corporation*, 4 F.C.C. 2d 715,716 (1966); *Northwest Broadcasters, Inc.*, 3 F.C.C. 2d 571 (1966).[17] In any event, the terms on which Garden State would be given the opportunity to compete in what we believe to be the unlikely event that its disqualification is reversed in court is a matter best left for another day.

14. As we have noted in a similar procedural context, our grant in the instant transfer amounts only to consent, and, absent a stay or injunction by the court, the applicants are free to consummate the transaction at their own risk. *Spanish International Communications Corp*, 3 F.C.C. Rcd 4319, 4321 (1988), *aff'd on other grounds sub nom. Coalition for the Preservation of Hispanic Broadcasting v. F.C.C.*, 931 F.2d 72 (D.C. Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 298 (1991). Moreover, consummation of the transaction neither prejudices a petitioner's right to judicial review nor our ability to take remedial action, if the court so orders. *Id.* Therefore, it is BHC which assumes the risk that the transaction may be subject to further proceedings. *Id.* (citing *Improvement Leasing Company*, 73 F.C.C. 2d 676, 684 (1979), *aff'd sub nom. Washington Association for Television and Children v. F.C.C.*, 665 F.2d 1264 (D.C. Cir. 1981)).*See also Coalition for the Preservation of Hispanic Broadcasting v. F.C.C.*, 893 F.2d 1349, 1368 (D.C. Cir. 1990), *rehearing granted on other grounds*, 931 F.2d at 80. This procedural policy, we note, enhances the concept of &transferability of licenses, as embodied in Section 310(d) of the Act." [T]he fundamental purpose underlying the 1952 amendments to Section 310 [was] to avoid an unwise invasion by a governmental agency into private business practice... and undue delay in passing upon transfers of licenses. '"*MMM Holdings, Inc.*, 4 F.C.C. Rcd 6838, 6839 (CCB, MMB 1989), *review denied*, 4 F.C.C. Rcd 8243 (1989)(quoting S. Rep. No. 44, 82d Cong., 1st Sess. 8, 9 (1951)).

15. Further, Garden State's attempt to compare WWOR's successful prosecution of its renewal application to a *Jefferson Radio* situation, where issues concerning the basic qualifications of a licensee wishing to transfer its license remain unresolved, is without merit.[18] Unlike the licensee in *Jack O. Gross*, 31 F.C.C. 2d 226 (1971), the case Garden State cites to support its contention that Pinelands has no license to transfer, Pinelands has not only undergone Commission scrutiny of Garden State's allegations of character issues, but has emerged as a qualified licensee whose renewal application has been granted. Thus, the *Jefferson Radio* policy is inapplicable here. Pinelands, therefore, is free to dispose of its license subject to our approval, as well as to the risks noted above.

16. We also reject Garden State's suggestion that the Commission seek remand of the comparative renewal proceeding from the Court of Appeals and designate the renewal and instant transfer applications for hearing in a consolidated proceeding. Garden State advocates this action in order that we may ascertain the basic qualifications of WWOR and Pinelands, issues it alleges are pertinent to both applications. Garden State also urges that we designate certain issues for such a consolidated hearing as to BHC's qualifications, even though it "may not be strictly necessary to try" those issues. The Commission is obliged, according to Garden State, to resolve substantial and material questions of fact concerning Pinelands's qualifications, even if the renewal application is pending before the Court of Appeals. In most cases, it is it our policy to dismiss summarily requests for remand of court proceedings. *New Radio Corp.*, 2 F.C.C. Rcd 112 (1987). That policy is appropriately applied here. We have fully explored Garden State's six petitions to enlarge issues against Pinelands in the renewal proceeding. We determined that Garden State failed to establish any substantial and material questions of fact and that Pinelands is qualified to be a licensee. We further find, as explained below, that the allegations raised here also do not warrant a hearing. Accordingly, we find no basis for seeking a remand.

17. In sum, Garden State has failed to demonstrate how it would suffer irreparable injury or how the public interest would be adversely affected if the application for trans-

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may find in our grant of the transfer to Pinelands. Because we have made the requisite public interest finding as to Pinelands, *WWOR-TV, Inc.*, 6 F.C.C. Rcd 193 (1990), *recon. denied*, 6 F.C.C. Rcd 6569 (1991), we disagree with Garden State's allegations that the qualifications of Pinelands are still in question. However, because Commission grants are subject to carrying out a judgment of the court, pursuant to Section 402(h) of the Act, we remind the applicants in the case before us that beyond the risks that adhere to the renewal proceeding pending judicial review, an applicant such as BHC also bears potential costs inherent in the grant of a transfer application that is later reversed by the Court of Appeals. *See, e.g., Teleprompter Corp.*, 87 F.C.C. 2d 531, 575 (1981), *stay denied*, 50 R.R. 2d 125 (1981), *aff'd on recon.*, 89 F.C.C. 2d 417 (1982) ("consummation of the merger followed by reversal of this decision on appeal would obviously involve costs to the merging parties..."); *Pacifica Foundation*, 24 F.C.C. 2d 816, 817-18 (1970)(applicants on notice that they are proceeding at their own risk pending judicial review). Therefore, contrary to Garden State's allegations, grant of the Pinelands-BHC transfer neither shows contempt for the Court of Appeals nor forecloses the court from granting a remedy, if any, it may find appropriate.

[17] On several occasions we have also permitted applicants to amend after designation to show transfers resulting from the death of a party to an applicant. *See Azalea Corp.*, 38 F.C.C. 2d 95 (Rev. Bd. 1972); *Creek County Broadcasting Co.*, 31 F.C.C. 2d 462 (Rev. Bd. 1971); *Florida Gospel Network*, 41 R. R. 2d 146 (A. L. J. 1977). Although those transfers were involuntary, we note the procedural similarity in that the substituted party is not permitted to improve its comparative posture. *See, e.g., Rose Broadcasting Company*, 68 F.C.C. 2d 1242 (1978)(transferee whose interest in company increased by 51 percent to 65 percent ownership allowed to claim only the 51 percent integration proposed before the transferor's death).

[18] Garden State's invocation of *Jefferson Radio* is, in essence, another avenue for revisiting its assertion that we defer action on the transfer application pending the outcome of its appeal. Although we never expressly cited *Jefferson Radio* as the premise of *Basic Qualifications*, it is evident that we view the two policies as emanating from the principle that a licensee has nothing to assign until basic qualifications issues against it have been resolved by the Commission. *See, e.g., RKO General, Inc.*, 82 F.C.C. 2d 291, 302 n. 47 (1980). Here, we have found Pinelands qualified and deferral of action on its transfer application, therefore, is unwarranted.

fer of control were granted. Moreover, deferral of our action on the transfer application would place an unnecessary limitation on the transferability of the license and would unfairly injure Pinelands shareholders to the degree that they will be unable to proceed with or enjoy the benefits of the tender offer. *See Macfadden Acquisition Corp.*, 60 R. R. 2d 872, 882 (1986). Thus, we find that the public interest would not be served by placing on indefinite hold the transfer application of Pinelands, a licensee whose renewal application we unconditionally granted.[19] We therefore deny that portion of Pinelands's petition to deny regarding the deferral.

Standing

18. Section 309(d) of the Act bestows standing on "any party in interest," an individual or entity which is able to establish that a grant of the instant application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature. *See, e.g., Telesis Corp.*, 68 F.C.C. 2d 696 (1978). Garden State maintains that it has standing to file this petition because of its appeal of the WWOR renewal proceeding, in which it filed a competing application. Grant of the instant application would injure Garden State, it argues, not only because Garden State seeks the very facilities Pinelands now wishes to transfer, but because it would be deprived of its rights "under the Communications Act of 1934, as amended." Moreover, Garden State contends, the court's review of the renewal would be prejudiced if we were to grant the Pinelands-BHC application. These alleged injuries, however, are merely speculative, as detailed in our discussion above. Such contingent and, we believe, unlikely injuries provide insufficient bases for establishing standing. Additionally, Garden State bases its right to standing in this proceeding on *Jacksonville Broadcasting Corp. v. F.C.C.*, 348 F.2d 75, *cert. denied*, 382 U.S. 893 (1965). In that case, a competing applicant which appealed the Commission's finding of its disqualification was deemed to have standing in the same appeal to contest grant of the construction permit to the winning applicant. Here, however, Garden State seeks standing in a proceeding separate from the one in which it was found to be disqualified and the public interest was found to be served by grant of the renewal application. Therefore, Garden State lacks standing on this ground as well.[20] Accordingly, we dismiss that portion of Garden State's petition raising substantive issues. Nevertheless, in view of the importance of the issues raised here, we will address Garden State's substantive allegations as part of our independent public interest analysis. *See Spanish International Communications Corp.*, 2F.C.C. Rcd 3336, 3342 n. 15 (1987), *aff'd sub nom. Coalition for the Preservation of Hispanic Broadcasting v. F.C.C.*, 931 F.2d 72 (D.C. Cir. 1991) (*en banc*).

SUBSTANTIVE ISSUES

Issues of Misrepresentation and Reporting Violations

19. *Garden State's allegations.* At the outset, Garden State asserts that in evaluating the instant application, we should assess WWOR's pattern of conduct in the renewal proceeding in addition to "new evidence of further misconduct."[21] Garden State claims that Pinelands's failure to report Gabelli's many ownership interests and resulting multiple ownership violations until its June 12, 1992 amendment to this application constitute misrepresentation and reporting violations warranting a hearing.

20. As to the issue of misrepresentation, Garden State cites Pinelands's "unconditionally certified" 1991 and 1992 annual ownership reports and its 1988 Integration and Diversification Statement, filed in the renewal proceeding and represented as "complete, accurate and current." Although the ownership reports indicated that Gabelli Funds, Inc. held an attributable interest via Gabelli personally, as well as through the several entities he "directly or indirectly controls and for which he acts as chief investment advisor,"[22] those reports indicated that Gabelli had no other reportable interests. Accordingly, Garden State contends, Pinelands's "None" response as to Gabelli's attributable interests and its failure to update the Diversification Statement so as to reflect the Gabelli holdings are clearly misrepresentations. The dual elements of misrepresentation, a false statement and an intent to deceive, are present here, Garden State argues. First, the statements in the ownership reports and Diversification Statement are false and, second, Pinelands intended to deceive the Commission,[23] as evidenced by: (1) Pinelands's duty to provide the information; (2) Pinelands's knowledge that it had to

[19] Garden State also cites the staff's policy of deferring grant of an assignment or transfer application until expiration of the petition to deny period on pending renewal applications. Yet, the staff defers action on the application only while it evaluates and responds to any such petitions or informal objections filed against it. In some cases, the staff will even grant the transfer prior to grant of the renewal application, with the express condition that consummation be deferred until the renewal is granted. Contrary to Garden State's implication, this policy has not been applied so as to span the period of judicial review.

[20] Garden also states that it has standing "[a]s a competitor that would suffer discrete harm from a grant of the application." Although Garden State competed for the Secaucus facility, it is not currently an economic competitor entitled to standing under *Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470 (1940).

[21] With regard to WWOR's past conduct, Garden State relies upon the six petitions to enlarge issues it filed against WWOR between October 1988 and September 1991 in the earlier renewal proceeding. These petitions, Garden State claims, "demonstrated that WWOR-TV had made misrepresentations, lacked candor, and/or abused the Commission's processes." Although Garden State acknowledges the Commission's denial of all six petitions, it notes its appeal of our decision and asserts that we should consider them now so that we may better evaluate WWOR's conduct "as a whole." Having already fully considered and ruled upon Garden State's petitions in a separate proceeding, we refuse to permit relitigation of those issues here.

[22] The Gabelli entities listed in Pinelands 1992 ownership report were Gabelli Funds, Inc., GAMCO Investors, Inc., Gabelli & Company, Inc., Gabelli Performance Partnership, and Gabelli Securities, Inc. The 1991 report included, in addition to the entities listed on the 1992 report, Gabelli & Company, Inc. Profit Sharing Plan, Lynch Corporation, and Safety Railway Service Corporation. Some of the relevant holdings of these companies have changed since the applications and pleadings were filed, but the problems noted in the pleadings are not resolved. However, as noted earlier, the Gabelli interest in Pinelands appears to have fallen below five percent, which is not an attributable interest.

[23] Garden State questions BHC's forthrightness with regard to the June 12, 1992 amendment, with respect to which it alleges BHC failed to list Gabelli's 9.79 percent interest in United Artists, an interest Rockland had included as a Gabelli interest

obtain information from Gabelli because it had learned of the various entities through which he controlled Pinelands's stock; (3) Pinelands's and WWOR's "clear motive" to conceal Gabelli's interests, based on the doubts it would raise as to their qualifications; (4) Pinelands's inability to obtain information regarding Gabelli's interests while West-Land and Rockland were able to learn of some of his other interests; (5) Pinelands's failure to amend its Diversification Statement to reflect the Gabelli interests, even though Pinelands "recognized" that it was required to update "because it amended that showing in an October 5, 1989 filing;" and (6) Pinelands's failure, prior to April 1992, to attempt to ascertain Gabelli's interests, including an alleged failure to contact Gabelli or his representatives. These circumstances, Garden State argues, constitute a *prima facie* case of intent to deceive. Moreover, Garden State argues, it has met its burden of demonstrating the existence of a substantial and material question of fact, as the misrepresentations here pertain to basic qualifications rather than to tangential issues. Therefore, according to Garden State, Pinelands's character qualifications must be designated for hearing. The applicants' alleged difficulty in obtaining the Gabelli information, Garden State contends, does not mitigate the misrepresentations because Pinelands had an obligation to obtain such information "by whatever means necessary."[24]

21. In addition, Garden State argues that Pinelands's failure to timely report the Gabelli interests and concomitant violations, a duty established in Section 1.65, requires us to specify a reporting issue against Pinelands. This is so, Garden State contends, in light of the "decisionally significant" interests as well as Pinelands's "intent to conceal."[25] As evidence of this intent, Garden State relies on its several allegations with regard to the issue of misrepresentation.

22. *Opposition.* In response, Pinelands contends that Garden State's allegations of misrepresentation are based solely on speculation whereas Pinelands offers the only properly supported evidence in the record, the sworn affidavit of Douglas Land, who, as vice president, secretary and general counsel, prepared the 1991 and 1992 ownership reports for Pinelands and its subsidiaries. Land states that, in preparing those reports, he reviewed the Securities and Exchange Commission (SEC) Schedule 13D filings of shareholders with attributable interests in Pinelands for "pertinent information regarding those shareholders." A Schedule 13D is generally required of a shareholder who acquires a beneficial interest of five percent or more of any class of shares of a publicly traded corporation. 17 C.F.R. § 240.13d-1. At the time he prepared and filed the reports, Land adds, he had no knowledge of any other Gabelli interests and responded "based on [his] good faith belief that such response was correct." Land declares that although "in hindsight, it appears that [he] could have been more aggressive in seeking information regarding Mr. Gabelli," he at no time intended to "mislead, deceive, or withhold information from the public or the Commission regarding Mr. Gabelli's media interests." However, Pinelands argues, the issue is not how vigorously,[26] in hindsight, Pinelands could have pursued Gabelli's interests, but whether Garden State raises a substantial and material question of fact of misrepresentation.

23. Finally, Pinelands asserts, the obstacles in amassing the Gabelli ownership information were formidable and no media-related entity in which Gabelli has an interest was able to compile the exhaustive list that Pinelands and BHC offer in their joint June 12, 1992 amendment. Contrary to Garden State's contention, Pinelands notes, the information concerning Gabelli was not readily available in complete form, and Pinelands and BHC compiled the list through an "extraordinarily tenacious process" involving numerous inquiries and follow-up correspondence with Gabelli's representatives. In addition, the applicants state that they reviewed Commission ownership reports and SEC Form 10-K reports, annual reports filed by issuers of registered securities, to determine whether any companies in a long list in which Gabelli eventually reported ownership interests may possibly have had media interests. Not even West-Land and Rockland, the closely held media companies Garden State proffers as evidence of Gabelli's cooperation in reporting, were able to assemble a list of Gabelli's media interests as thorough as that of Pinelands

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in its 1991 ownership report. According to Garden State, this alleged interest in United Artists, which has cable systems serving communities throughout New Jersey and New York, combined with Gabelli's interest in WWOR, violate the broadcast/cable cross-ownership rule, Section 76.501(a)(2). However, in their separate Oppositions, Pinelands and BHC each note that Gabelli never had an attributable interest because Tele-Communications, Inc. (TCI) was a single majority shareholder, rendering other interests noncognizable under Note 2(b) to Section 73.3555 of the Rules. In any event, according to the applicants, as of December 3, 1991, United Artists became a wholly owned subsidiary of TCI, eliminating any Gabelli interest.

[24] Garden State suggests that, in light of the absence of evidence as to Pinelands's effort to discover information, a declaration from Gabelli "or any other person" should have been submitted by Pinelands and BHC in lieu of the "incompetent allegations of counsel." As discussed below, Pinelands, in its Opposition, includes a sworn affidavit from its vice president, secretary and general counsel, Douglas Land, who was responsible for completing the ownership reports. BHC, as detailed in Note 37 *infra*, supports its due diligence defense with Chris-Craft's past ownership reports, on file at the Commission. We may take official notice of these reports; therefore, no affidavit is required to buttress statements gleaned from them.

[25] The reporting violation, Garden State adds, is a continuing one, because the renewal application and Diversification Statement have been improperly amended: rather than include the Gabelli interests in the amendments, Pinelands, according to Garden State, amended its diversification status by reference to the June 12, 1992 amendment and without specific mention of the Gabelli interests. Incorporation by reference is not a violation of Section 1.65. Pinelands's identification of, and reference to, the June 12 amendment on file satisfied the fundamental purpose of Section 1.65, to keep the Commission, the public and concerned parties informed of changing circumstances.

[26] In the June 12 amendment, Pinelands notes it was unaware of any other Gabelli interests until the proposed transaction with Disney. Prior to the filing of that transfer application on April 29, 1992, according to the amendment, outside counsel for Pinelands contacted Gabelli's representatives numerous times via letter, facsimile and telephone, seeking information pertinent to the transfer application. In that application, Pinelands notes, it disclosed all information it then had obtained, stating its commitment to seek further information from Gabelli. Those efforts, Pinelands asserts, continued through the instant application, when BHC joined forces with Pinelands in obtaining information from Gabelli representatives.

and BHC, according to Pinelands. Once the information was compiled, Pinelands notes, it promptly informed the Commission, pursuant to Section 1.65, via its June 12 amendment to the instant application, its revised ownership report, and its amendments to the renewal proceeding and the MCA-Pinelands transfer proceeding, both of which are pending in the Court of Appeals. *See* paragraph 3 *supra*.

24. *Discussion*. With regard to the issue of misrepresentation, we agree that Pinelands's "None" responses on the 1991 and 1992 ownership reports as to Gabelli's other attributable interests were clearly false, as was Pinelands's "complete, accurate and current" representation on its Diversification Statement. However, as Garden State notes, evidence of intent is an element basic to the issue of misrepresentation.[27] *See, e.g., Fox River Broadcasting, Inc.*, 93 F.C.C. 2d 127, 129 (1983). Thus, errors submitted through carelessness, *Weigel Broadcasting Co.*, 2 F.C.C. 2d 1206 (1987), inadvertence, *Radio Station WABZ, Inc.*, 90 F.C.C. 2d 818,827 (1982), *aff'd sub nom. Victor Broadcasting, Inc. v. F.C.C.*, 722 F.2d 756 (D.C. Cir. 1983), or even gross negligence, *Publix Television Corp.*, 36 F.C.C. 1215 (1964), do not constitute misrepresentation. Because intent is a state of mind ordinarily not capable of indisputable proof, *John C. Roach*, 28 R. R. 2d 1131, 1135 (Rev. Bd. 1973), it must be inferred from the circumstances. Here, Garden State's allegations fail to meet the threshold requirements of Section 309(d) of the Act. To begin with, allegations must be specific, not those capable of supporting more than one plausible conclusion. *See Arnold L. Chase*, 5 F.C.C. Rcd 1642, 1645 (1990). Additionally, the allegations of fact, except for those we can officially notice, must be supported by an affidavit from a person with personal knowledge of those facts. Further, allegations of "ultimate, conclusory facts or more general allegations based on information and belief" are inadequate. *Bilingual Bicultural Coalition V. F.C.C.*, 595 F.2d 621, 629 (D.C. Cir. 1978)(quoting S. Rep. No. 630, 86th Cong. 1st Sess. 3 (1959)).

25. Applying these standards to Garden State's allegations of circumstantial evidence of Pinelands's intent to deceive, we find that they are either unsupported by an affiant with personal knowledge, are conclusory or lack specificity. First, we find that Garden State's allegations of misrepresentation, as evidenced by Pinelands's duty to report, by Pinelands's prior amendment of its Diversification Statement, and by West-Land's and Rockland's submissions of more detailed information, are conclusory. Second, Garden State's allegation that Pinelands knew it had to obtain information from Gabelli because it had learned of Gabelli entities through which he holds Pinelands stock is not only conclusory but is unsupported by an affiant with first-hand knowledge that Pinelands "knew" Gabelli might have other attributable interests. Third, that Pinelands had a motive to conceal is conclusory.[28] Finally, Garden State's allegation that Pinelands never attempted to ascertain the Gabelli interests, although true, establishes at most that Pinelands was negligent. Negligence, although not condoned by the Commission, falls short of the intent required to constitute a *prima facie* showing of misrepresentation, as noted above.[29] Thus, even if the facts alleged by Garden State were true, we"Dfind that Garden State's case is not persuasive on the issue of Pinelands's misrepresentation, and no hearing is warranted.[30] Moreover, the sworn affidavit submitted by Pinelands's general counsel, although admitting what appears to be negligence, is the only properly supported evidence in the record of lack of intent as to Pinelands's failure to report the Gabelli interests.[31] However, we remain concerned that licensees exercise diligence in ascertaining the information required

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[27] Garden State's quotation of our warning in *Policy Statement on Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179, 1211 (1986), that we would treat "even the most insignificant misrepresentations as disqualifying," presents only half of the equation: intent must accompany even insignificant misrepresentations. *See, e.g., id.* at 1209 ("willful" misrepresentations).

[28] Pinelands, Garden State insists in its Reply, had "ample motive" for not reporting the Gabelli interests in that it might have jeopardized the timetable of the *pro forma* transfer of control from MCA to Pinelands. However, the *pro forma* transfer application, Form 316, requests information regarding other broadcast interests held by each "new stockholder and partner" rather than the interests of existing shareholders, such as Gabelli. Moreover, all of the information which Pinelands and BHC purportedly attempted to conceal was on file in the separate ownership reports filed by other licensees. We think it highly unlikely that an applicant would intentionally withhold such readily available information, if it was, in fact, aware of such information.

[29] Garden State cites *David Ortiz Radio Corporation v. F.C.C.*, 941 F.2d 1253 (D.C. Cir. 1991), and *WHW Enterprises, Inc. v. F.C.C.*, 753 F.2d 1132 (D.C. Cir. 1985), to remind us that the Court of Appeals "has not hesitated to remand proceedings back to the Commission" when the record has contained affirmative misstatements by an applicant. However, these cases are readily distinguishable from the one before us. The applicant in *David Ortiz* included on his application a transmitter site to which he was later denied access. Rather than inform the Commission of the unavailability of this site, the applicant submitted two subsequent filings listing the original site as the transmitter location." Had [the applicant] remained silent" between the time it learned of the unavailability of the site and the time it identified its new site, the court noted, "any charge of deliberate concealment might justly have been dismissed as mere speculation and surmise.' *Id.* at 1259-60. Accordingly, the court found that the two filings, submitted after the applicant obtained knowledge of the site's availability, potentially met the Commission's standard of "suitable evidence of intent to conceal," as established in *Valley Broadcasting Co.*, 4 F.C.C. Rcd 2611, 2618 (Rev. Bd. 1989). In *WHW Enterprises*, the applicant represented as his assets land to which he knew he did not have legal title. Here, there is no evidence that Pinelands knew that its representations were false. Accordingly, the requisite intent for misrepresentation is absent.

[30] Even if we were to find that Garden State has made a *prima facie* showing of misrepresentation, there is clearly no substantial and material question of fact. *See Citizens for Jazz on WRVR, Inc. v. F.C.C.*, 775 F.2d 392 (D.C. Cir. 1985). Further, we note that Garden State's allegations are before us solely for the purpose of reviewing the transfer application. To the extent that Garden State seeks the addition of issues in the closed comparative proceeding, its allegations are misdirected.

[31] In its Reply, Garden State attacks Land's reference to his review of the SEC 13D filings in preparing the ownership reports as "crafted to mislead the Commission." Those filings, as Garden State correctly notes, do not require disclosure of other media holdings. Therefore, Garden State intimates, Land's failure to specify and submit the filings he reviewed constitute an intent to deceive. However, a Schedule 13D is generally required of individual investors, such as Gabelli, upon acquiring directly or indirectly the beneficial ownership of more than five percent of any class of shares of a publicly traded corporation. 17 C.F.R. §240.13d-1. Accordingly, a more diligent review of

on ownership reports and other Commission filings. While Pinelands's diligence fell short of our expectations of licensees, we find that its omissions do not rise to the level of misrepresentation.

26. As to Garden State's contention that we specify a reporting issue against Pinelands,[32] we note that reporting failures will not warrant disqualification absent suitable evidence of an intent to conceal pertinent information from the Commission or other evidence reflecting violations so numerous and serious as to undermine the applicant's responsibility to be a licensee. *Valley Broadcasting Co.*, 4 F.C.C. Rcd 2611, 2618 (Rev. Bd. 1989). Because Garden State relies on its allegations with regard to the misrepresentation issue as evidence of Pinelands's intent to conceal, no hearing on this issue is warranted for the same reasons as discussed above.

Waiver of One-to-a-Market Rule

27. Section 73.3555(b), the "one-to-a-market" rule, generally provides that television and radio station combinations cannot be created where the Grade A contour of the television station encompasses the city of license of any commonly held radio station. However, in *Amendment of Section 73.3555 of the Commission's Rules, Second Report and Order*, 4 F.C.C. Rcd 1741, 1751, *reconsidered in part*, 4 F.C.C. Rcd 6489 (1989), we relaxed the one-to-a-market rule, stating that we would look favorably upon waiver applications pertaining to radio and television combinations in the top 25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees or "voices" after the proposed merger. In relaxing the rule, we noted that "[a]n applicant requesting a waiver under this standard would be expected to provide documentation showing that this test has been met." *Id.* Here, BHC, in which Gabelli has an 18.5 percent interest, has requested a waiver of the one-to-a-market rule, because the Grade A contour of WWOR-TV encompasses the communities of license of WXPS(FM), Briarcliff Manor, New York, and of WRKL (AM), New City, New York. Gabelli is a director and holds a 20-percent interest in the licensees of each of those radio stations, according to those stations' ownership reports. In support of its waiver request, BHC concludes, based on the tabulation provided in *Capital Cities/ABC, Inc.*, 4 F.C.C. Rcd 5498 (1989), that "there will plainly be more than 30 separately owned, operated and controlled broadcast licensees in that market after the transfer is consummated."[33] Garden State contends that BHC's request is deficient for several reasons, including its showing predicated upon a past waiver case."[34] We note, however, that Garden State does not contest the statement in *Capital Cities/ABC* that there are 93 separate voices in the New York City market, nor does it assert, as it could not, that there has been a decisionally significant reduction of the number of voices since that time. Insisting on a retabulation of separate voices in these circumstances would serve no useful purpose. Nonetheless, we will not act on a request for a permanent waiver at this time, because we want to be fully apprised of all of Gabelli's interests, including any possible additional interests in the New York City market, before taking any action. We do, however, hereby grant a temporary waiver of the one-to-a-market rule to the applicants until full information is available to us as to the Gabelli interests and until the disposition of his interests is resolved through the show cause proceeding referenced below.

Effect of Gabelli's interests and resulting violations

28. Lastly, Garden State argues that the numerous interests and resulting rule violations militate against our grant of the Pinelands-BHC transfer application. Enumerating the several rule violations involving WWOR-TV, as volunteered by Pinelands and BHC, as well as others Garden

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SEC filings may have revealed further Gabelli holdings. Further, Garden State's contention, that it is not "credible" that a corporate officer such as Land would certify an ownership report without contacting a "major outside investor-shareholder" such as Gabelli, is speculation. Nor are we able to consider, as Garden State suggests in its Supplement to Petition to Deny, a letter published in the July 20, 1992 issue of *Electronic Media*. According to Garden State, the letter, written by Salvatore Muoio, director of research for Gabelli & Company, Inc., if accurate, establishes that "Land either misrepresented that he reviewed Gabelli's SEC filings or knew that Gabelli had media interests but still misrepresented to the contrary." However, Garden State's reliance on such a publication is not an acceptable substitute for the submission of an affidavit by a person having personal knowledge of the facts alleged. *See, e.g., Mississippi Authority for Educational TV*, 79 F.C.C. 2d 577, 579 (1980). Even if we were to consider Muoio's published letter, we find no evidence of Land's intent to misrepresent Gabelli's holdings: the letter merely responds to an article in *Electronic Media* which alleged that Gabelli failed to disclose the extent of his media holdings. The letter states that "[a]ll our filings on all companies, and not only those in the media industry, are published according to strict Securities and Exchange Commission guidelines." In conclusion, we find, as noted above, that, although Pinelands could have been more attentive in compiling Gabelli's other interests, Garden State has made neither a *prima facie* showing nor raised a substantial and material question of fact that Pinelands's conduct amounts to misrepresentation.

[32] Garden State relies on *Merrimack Valley Broadcasting, Inc.*, 99 F.C.C. 2d 680,683-84 n. 9 (1984) in arguing that a reporting issue must be specified when "unreported interests are of decisional significance," and on *Mid-Ohio Communications, Inc.*, 104 F.C.C. 2d 572,591-93 (Rev. Bd. 1986), *review denied*, 5 F.C.C. Rcd 940, *recon. denied*, 5 F.C.C. Rcd 4596 (1990), in noting that a renewal applicant was disqualified for failing to report information of decisional significance concerning its integration proposal. The records established in these cases revealed that not only had the licensees known of the reportable changed circumstances but that they had made a conscious decision not to report them. Here, however, Pinelands failed to report the Gabelli interests because it had no knowledge of them.

[33] In addition, BHC notes, Gabelli's shareholder interest in Chris-Craft, a company in which the officers and directors collectively hold nearly 50 percent of the voting power, gives Gabelli "scant if any ability to influence the operation of transferee's stations." For a discussion of Garden State's allegation of Gabelli control of Chris-Craft, see *infra* Note 37.

[34] Additionally, Garden State notes that the *Capital Cities/ABC* case should not apply here because we are presented with several adverse factors not present in *Capital Cities/ABC*, including Gabelli's egregious violations, Pinelands's failure to timely disclose them, BHC's failure to disclose the United Artists interest and resulting broadcast/cable cross-ownership violations, and the combined effect of those several violations on BHC's qualifications. Further, in its Reply, Garden State characterizes grant of BHC's waiver request as a "reward" to parties who have "treated the Commission's Rules so cavalierly." We have addressed above Pinelands's failure to report, as well as Gabelli's alleged interest in United Artists, and we address the remaining arguments in paragraphs 27 through 31.

State believes exist.[35] Garden State assigns accountability for these violations to Pinelands, which, it notes, "has been violating Commission rules ever since Pinelands acquired control of WWOR-TV, Inc."[36] Additionally, Garden State urges us to consider the combined effect of the multiple ownership rule violations on BHC's qualifications. Consequently, Garden State asserts, until the parties are found to be fully qualified, the Commission may not grant the instant application.

29. The multitudinous media interests of Gabelli and the violations of our ownership rules created thereby are serious matters. We are gravely concerned about the potential for evasion of Commission rules by investors. However, while cautioning corporate licensees to be vigilant in monitoring the media holdings of their shareholders, we decline to impede, based on the infractions of one shareholder, the proposed tender offer by BHC, which has diligently attempted to obtain from Gabelli a list of his other cognizable interests.[37] Further, withholding" (action because of Gabelli's interests would be detrimental to the innocent shareholders who have not created this problem. To the extent that other temporary waivers of our multiple- and cross-ownership rules are needed to grant this transaction, based on the unique circumstances of this case, we hereby grant them to the applicants.

30. As Pinelands and BHC observe, in past cases where an investor's interests or control violated Commission rules, we have severed our evaluation of the transfer application from our investigation and action as to that investor. *See Value Line Special Situations Fund, Inc.*, 24 R.R. 2d 972, *recon. denied*, 25 R.R. 2d 265 (1972); *College Retirement Equities Fund*, 24 R.R. 2d 841 (1972); *Keystone Custodian Funds, Inc.*, 24 R.R. 2d 842 (1972).[38] Indeed, we sanctioned this bifurcated process in *Corporate Ownership Reporting and Disclosure by Broadcast Licensees (Attribution)*, 97 F.C.C. 2d, 997, 1033 (1984), *recon. granted*, 58 R.R. 2d 604 (1985), *further recon.*, 1 F.C.C. Rcd 802 (1986), observing that we have "long presumed the authority to order [of individual shareholders] divestiture of stock to effect compliance with the multiple ownership rules." This authority derives from Sections 4(i) and 303(r) of the Act, which grants us the "authority reasonably ancillary to the effective performance" of our responsibilities, *U.S. v. Southwestern Cable Co. et al.*, 392 U.S. 157, 178 (1968), and Section 312, which authorizes us to issue cease and desist orders to a licensee, permittee, "or person involved" in a rule violation. Moreover, Section 503(b), the forfeiture provision, grants the Commission authority over "any person" who is determined by the Commission to have violated Commission rules.

31. We declined in *Attribution* to define comprehensively the circumstances in which the exercise of this authority would be appropriate, finding instead that "we shall make this determination in the context of specific facts, as relevant cases arise." *Id.* at 1033. The case before us is one of those "relevant cases," and the egregiousness of Gabelli's alleged attributable interests and resulting violations demand a forum separate from the one here, so

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[35] Garden State asserts that several of the New Jersey communities in which Media General's subsidiaries publish daily newspapers lie within the Grade A contour of WWOR-TV, not the Grade B contour as Pinelands and BHC suggest, thereby violating Section 73.3555(c) of the multiple ownership rule. *See supra* Note 8. In addition, Garden State contends that Gabelli has an interest in United Artists, which owns cable systems that may cause rule violations with regard to WWOR-TV. *See supra* Note 23.

[36] This point, Garden State contends, is "extremely relevant" to its appeal of our earlier grant of the MCA-Pinelands transfer, applied for on Form 316, the "short form" used in *pro forma* transfers. If, Garden State argues, we had required that transfer to be processed on a Form 315, Gabelli's interest would have been discovered at the time of that transfer. We are not persuaded that a list as exhaustive as the one Pinelands and BHC now offer would have resulted from a Form 315 application in that 1990 transfer. Even when asked by Chris-Craft as early as May 1988, more than two years prior to the MCA-Pinelands transfer, Gabelli did not provide information regarding his other media holdings. Indeed, as indicated in the June 12 amendment, a 1991 ownership report filed for several Gabelli entities with respect to their interests in the licensee of television station WHBF-TV, Rock Island, Illinois, reported as other broadcast interests only the Chris-Craft stations and an indirect interest in a "subject FM licensee" in Florida.

[37] As early as its May 1988 ownership report, Chris-Craft, parent company of BHC, indicated that it had requested that Gabelli and his investment entities submit ownership reports. In December 1989, Chris-Craft amended its ownership report, indicating that Gabelli "decline[d] to provide the requested ownership reports," but that he had provided information regarding some of his interests, including West-Land, Rockland, Lynch Corporation and RKO General, Inc., then licensee of one television and four radio stations.

Chris-Craft's June 1990 ownership report cited an April 1990 letter it had sent to Gabelli's counsel, urging completion of reports on his behalf, as evidence of Gabelli's continued lack of cooperation. Similar representations regarding Gabelli's failure to fully disclose his interests were noted in the 1991 and 1992 ownership reports.

In addition, BHC notes that not only is it clear that Pinelands and BHC have no control over Gabelli or his investment activities, but that, contrary to Garden State's allegation, Gabelli neither participates in management nor "intends to seek control" of BHC or Chris-Craft, as represented by Gabelli's Schedule 13d filings of January 18, 1990, for BHC, and of August 26, 1988, for Chris-Craft. As support for its contention of Gabelli's "power to influence the affairs of BHC and its parent Chris-Craft," Garden State cites a May 8, 1992 *Wall Street Journal* article highlighting Gabelli's role in "pushing" Chris-Craft's tender offer. However, we are unable to take official notice of newspaper articles, *see KRPL, Inc.*, 5 F.C.C. Rcd 2823, 2824 (1990), and we have established that "influence" is not tantamount to control, *see, e.g., News International, PLC*, 97 F.C.C. 2d 349, 356 (1984). Consequently, we dismiss Garden State's allegation of Gabelli control of BHC or Chris-Craft. Further, we dismiss Garden State's statement that BHC "offers no reasons for the Commission to believe that Gabelli will not look out for the interests of himself and his clients" as speculative and irrelevant to the issue of control.

[38] Garden States asserts that these cases are not applicable to the situation here, because none of those cases involved the "egregious rule violations present here or the lack of honesty present in this case." However, our bifurcated actions in those cases were based on the existence of violations by investment companies, the egregiousness of which was not a factor. Moreover, as noted below, *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 97 F.C.C. 2d 997, 1033 (1984), gives us the flexibility to utilize this procedure when we deem it warranted. Further, as we have determined, neither applicant has been found to have misrepresented the Gabelli interests, and we see no reason to depart from the bifurcated process established in those cases.

that we may thoroughly assess the scope of Gabelli's holdings. Accordingly, today we are issuing to Gabelli and related companies an order to show cause, directing him to file with the Commission a list of all entities (including holdings in his personal name) that hold Commission licenses, certificates or other instruments of authorization, or have applications pending before the Commission, in which he, directly or indirectly, holds an attributable interest under the relevant Commission rules. We are also initiating a hearing to determine whether he should be ordered to cease and desist from his apparent statutory and rule violations.[39]

Conclusion

32. We find that the applicants are fully qualified and that a grant of the application would serve the public interest.[40] However, our action permits, and does not compel, the tender offer to go forward. Accordingly, it is the shareholders of Pinelands who ultimately approve or disapprove the transaction.

33. Accordingly, IT IS ORDERED That the Petition to Deny of Garden State Broadcasting Limited Partnership IS DENIED IN PART AND DISMISSED IN PART.

34. IT IS FURTHER ORDERED, That the application for transfer of control of WWOR-TV, Inc., from Pinelands, Inc. to BHC Communications, Inc. (BTCCT-920514KE) IS GRANTED.

35. The staff of the Mass Media Bureau is directed to send copies of this decision to the parties to this proceeding by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

CONCURRING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In re Application of Pinelands, Inc. and BHC Communications, Inc. For Transfer of Control of WWOR-TV, Inc., Licensee of WWOR-TV, Secaucus, New Jersey (MMB File No. BTCCT-920514KE)

The Commission today approves the transfer of control of WWOR-TV from Pinelands, Inc., to BHC Communications, Inc. In the course of reviewing this transaction, the Commission has discovered that Mario J. Gabelli, either individually or through investment funds, appears to hold attributable interests in 27 television stations nationwide. These holdings, as reported by Pinelands and BHC, not only would violate the Commission's 12-station national ownership rule; they appear to implicate virtually every cross-ownership and multiple-ownership rule established by the Commission.

In light of these disclosures, I can concur with the result only because the Commission is dividing its action into two steps. First, we are acting separately on the transfer application, which is found to be in the public interest. Second, and simultaneously, we are launching a cease-and-desist proceeding against Mr. Gabelli and his investment funds. I trust that the Commission will fully identify the extent of his ownership interests and, where warranted, will take action to enforce its rules.

In my judgment, one noncontrolling investor should not be able to freeze the sale of WWOR-TV while his own cease-and-desist proceeding takes place. A large number of unoffending shareholders of both Pinelands and BHC would be harmed, and a transaction would be stymied that otherwise meets our public interest test. Delay would have been imperative in my view, however, if the Commission had not swiftly launched the cease-and-desist action and ordered that it be expedited. So long as we are vigorously pursuing that action, I can accept the separate approval of the transfer application.

Finally, I want to underscore what the Commission's order says about the need for ownership due diligence by publicly traded licensees. Complying with our ownership reporting requirements demands effort— especially when a licensee encounters such difficulties as Pinelands and BHC have apparently experienced here. As the order reflects, the Commission fully expects publicly held licensees to take every reasonable step to identify and report on their ownership. Clearly in this instance the applicants could have shown greater persistence in that effort.

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[39] Garden State asserts that Pinelands and BHC should be required to list all interests Gabelli has held since he acquired an interest in WWOR-TV. We see no benefit to be gained from further scrutinizing a history of Gabelli's holdings in the context of this case. Accordingly, while it is true, as Garden State notes, that Pinelands never sought a timely waiver of the rules, it is clear that Pinelands would not seek waiver of rules when it never knew violations of those rules existed. Moreover, in response to Garden State's allegation that those violations cannot be retroactively cured, we note that in the absence of Pinelands's misrepresentation, we do not find qualifications issues in connection with the transfer application. However, we will, upon ascertainment of existing Gabelli interests and resulting violations, take whatever action may then be appropriate.

[40] Grant of this transfer application is not conditional, as Garden State's Reply assumes must be the case where numerous rule violations are present. As discussed above, we are severing the issue of Gabelli's interests and resulting violations from action on the transfer application, thereby bifurcating the process as we have done with similar cases in the past.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-34

In the Matter of

Amendment of Part 90 of the Commission's Rules to Permit the Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees

CORRECTED

MEMORANDUM OPINION AND ORDER

Adopted: August 4, 1992; Released: September 4, 1992

By the Commission:

I. INTRODUCTION/BACKGROUND

1. On July 19, 1991, we adopted rules[1] to permit applicants for Specialized Mobile Radio (SMR) stations to locate their base station transmitters closer to co-channel licensees than the standard co-channel mileage separation distances -- a practice generally reffered to as "short-spacing" -- without seeking a rule waiver.[2] Specifically, the *Order* authorized applicants to short-space without a waiver under two scenarios. The first of these is referred to as "consensual short-spacing" and enables an applicant to short-space by submitting written consent from all affected co-channel licensees evidencing their willingness to accept any interference that results from the reduced mileage separation. The second scenario is referred to as "technical short-spacing" and allows an applicant to short-space in accordance with the mileage separations identified in our shortspacing "Table."[3]

2. The National Association of Business and Educational Radio, Inc. (NABER), the American Mobile Telecommunications Association, Inc. (AMTA), Commercial Engineering Corporation (CEC), and Francis J. DiRico (DiRico) have petitioned us to reconsider certain aspects of our *Order*.[4] Generally petitioners believe that we should evaluate all waiver requests using the 40/22 dBu contour protection ratio, rather than the existing 40/30 dBu contour protection ratio. In our Second Report and Order in Docket No. 18262, 46 FCC 2d 752 (1974), which authorized the Specialized Mobile Radio Service, we found that, on the average, two co-channel systems would operate effectively if the 30 dBu contour of one station is not permitted to overlap the 40 dBu contour of the other station. This so-called 40/30 dBu contour standard is generally satisfied if two co-channel facilities operating at maximum power and antenna height are separated by at least 113 km (70 miles). Because short-spacing using the Table does not require the submission of a contour study to assure this level of protection, we decided that the distances in the short-spacing Table to avoid overlap of the existing station's 40 dBu service contour should correlate to the proposed station's 22 dBu (rather than the 30 dBu) interfering contour. This more conservative criteria was designed to provide extra mileage protection to existing stations when applicants proposing to short-space to such stations utilize the Table. Applicants, however, may still submit a waiver request in accordance with the 40/30 dBu contour standard.

3. Petitioners also request that we change the method for calculating the antenna height above average terrain when considering short-spaced proposals. Petitioners further request that we allow an applicant to consider an existing station's actual power and antenna height in certain short-spacing situations. Petitioners also argue that we should modify our co-channel standards in mountainous areas to account better for the very high antenna elevations and extremes in terrain in these areas. Finally, petitioners submit that we should require additional information when a waiver is requested, extend the period provided for existing licensees to respond to short-spacing proposals, increase the number of columns in the short-spacing Table, and impose a two-year moratorium on short-spacing requests.

II. DISCUSSION

4. Upon a review of the record and for the reasons indicated below, we will grant the NABER and AMTA petitions in part, deny the CEC and DiRico petitions, and affirm all other aspects of the *Order*. Specifically, we decline to modify the criteria used to evaluate waivers of Section 90.621(b) of the Rules. The 40/22 dBu criteria used to determine appropriate co-channel mileage separation distances under the Table provides an extra measure of protection to existing stations. This additional mileage protection was provided due to the lack of the detailed contour analysis that is required when short-spacing is requested through the waiver procedure.[5] Basing the short-spacing Table on the 40/22 dBu protection ratio did not, however, modify our criteria for licensing SMRs. As stated in the *Order*, we determined that the 113 km separation standard should continue to serve as the primary assignment method because our experience demonstrates that a 113 km separation provides the appropriate balance between spectrum efficiency and quality of service.[6] Evaluating waivers using the 40/22 dBu criteria would provide existing co-channel licensees greater protection than they

[1] Report and Order (*Order*), PR Docket 90-34, 6 FCC Rcd 4929 (1991).

[2] Generally, the ordinary separation between co-channel SMR stations is 113 km (70 miles), except on certain mountain peaks in Southern California and Washington state, where the mileage separation is 105 miles and in Northern California where such stations are licensed according to a matrix. *See*, 47 C.F.R. § 90.621(b).

[3] *See*, 47 C.F.R. § 90.621(b)(4).

[4] Comments on these petitions were filed by Fleet Call, Inc. (Fleet Call) on December 13, 1991, and by the Southern California Edison Company (SCE) on December 12, 1991. Reply comments were filed by CEC on December 27, 1991.

[5] *See, Order*, 6 FCC Rcd at 4931.

[6] *See, Order* 6 FCC Rcd at 4930.

currently receive under the existing 113-km co-channel separation standard (which is based on a 40/30 dBu criteria). Adoption of a 40/22 dBu criteria would result in a co-channel separation standard substantially greater than 113 km. Although no commenters have requested such a change in the fixed-mileage licensing criteria, adoption of a new protection ratio of 40/22 dBu while failing to modify the existing 113-km co-channel separation criteria would lead to an inconsistency in our Rules. Accordingly, we will continue to evaluate short-spacing waiver requests based on our existing 40/30 dBu protection ratio.

5. We will, however, reconsider our short-spacing rules to use a more appropriate calculation of the antenna height above average terrain (HAAT)[7] when an applicant applies under the short-spacing Table. As NABER and AMTA argue, variations in terrain could result in the standard HAAT not providing the most appropriate representation of antenna height for purposes of determining the interference potential between stations. Using the standard HAAT can sometimes result in a discrepancy between the actual and the predicted distance to the relevant contour in a given direction. We agree, therefore, that a directional HAAT (DHAAT) should be employed when using the short-spacing Table.[8] An applicant applying for a routine technical short-spaced station under Section 90.621(b) will now be required to use the DHAAT to determine the maximum permissible power for a given distance between stations. The applicant will also be required, as part of the application, to include the standard eight-radial HAAT. The standard HAAT will be the antenna height that appears on the license and will be used for any subsequent calculations that may be required with respect to the licensee's assignment.

6. We decline to adopt AMTA's proposal to extend use of the DHAAT to waiver requests or to require use of the antenna height above mean sea level (HAMSL) in mountainous terrain. We find it inappropriate to adopt use of either the DHAAT or HAMSL as a means of accurately predicting the relevant contours when, due to the often extreme terrain considered in a waiver situation, neither the DHAAT or the HAMSL would necessarily be sufficiently accurate to justify a waiver. We find the public interest is best served by continuing our existing policy of permitting applicants submitting waiver requests to use whatever contour prediction method provides the strongest support for the particular waiver request. Review of the waiver request by both the Private Radio Bureau's Licensing Division and affected co-channel licensees will continue to serve as a reliable means of confirming the validity of the waiver request.

7. We decline to adopt the proposal of AMTA and NABER[9] to allow short-spacing using the Table to be based on an existing facility's actual power/antenna height when the existing facility has itself been authorized as a short-spaced station. A station authorized to short-space, once licensed, is not regarded differently than any other station and it is afforded the same co-channel protection given to fully-spaced stations. Accordingly, if an applicant wishes to short-space to a station that has itself been authorized as a short-spaced station, and if the applicant is proposing to use the short-spacing Table, it must protect the existing short-spaced station as if it were authorized for the maximum power/maximum antenna height provided by our rules. We will only permit short-spacing based on a station's actual power and antenna height when an applicant adequately demonstrates that short-spacing is justified using the station's actual power and antenna height as part of a waiver request. We take this opportunity, however, to clarify our position with regard to instances where a station, after having been short-spaced by another station, finds it necessary to modify its facilities. In such an instance the petitioners argue that the original licensee would be unjustly disadvantaged by having to protect the short-spaced station to maximum power and height. Although the licensee could request a waiver and consider the short-spaced station's actual power/height, this, claim the petitioners, would place an undue burden on the licensee. Consequently, we will permit a licensee in this situation to modify its facility without requesting a waiver as long as the station does not extend its 30 dBu contour beyond its *maximum* 30 dBu contour (i.e., the 30 dBu contour calculated using the station's maximum power and antenna height at its original location) in the direction of the short-spaced station. Accordingly, a short-spaced station will not infringe upon an existing licensee's reasonable expectation that it be able to modify its facilities in accordance with the Rules.

8. We decline to adopt petitioner's recommendations that the use of the short-spacing Table not be permitted in certain areas of the country.[10] NABER, CEC, and SEC argue that because of the extreme terrain in mountainous areas such as Southern California and parts of Washington State the protection offered by the short-spacing Table is insufficient to ensure the reasonable integrity of existing operations. Accordingly, the petitioners request that short-spacing in such mountainous areas only be permitted on a waiver basis. The method of short-spacing using the Table adopted in the *Order*,[11] however, provides protection to stations in the mountainous areas of California and Washington equivalent to the protection given to stations in all other parts of the country. NABER correctly notes that in some instances the predicted 40 dBu contour of stations operating at maximum facilities in high elevations determined using Table 2 in Section 90.635(c) of the Rules may extend beyond the 46.7 km (29 miles) calculated for non-mountainous stations operating at maximum facilities.[12] This small anomaly has been a part of our Rules for many years, however, and such stations have been able to operate satisfactorily during this time period without need for additional protection. NABER has not offered any reason as to why such stations should now be given special consideration in the licensing of short-spaced stations

[7] The standard HAAT is calculated using the average of the antenna heights above terrain between 3 and 16 km (2 and 10 miles) from a transmitter site along eight radials at 0, 45, 90, 135, 180, 225, 270, and 315 degrees. *See* 47 C.F.R. § 73.310.

[8] The DHAAT is calculated, for the proposed station, as the average of the antenna heights above average terrain from 3 to 16 kilometers from the proposed antenna along a radial extending in the direction of the existing station and along the radials 15 degrees to either side of this radial.

[9] AMTA petition at 11-14, NABER petition at 12-14.

[10] *See*, NABER petition at 8-10, CEC petition at 1-6, SEC comments at 5-6.

[11] In the *Order* we specified that the co-channel separation for sites in Southern California and Seattle, Washington, where the required (fully spaced) separation is 169 km (105 miles) rather than 113 km, will be determined by adding a fixed 56 km (35 miles) to the distances indicated in the short-spacing table.

[12] *See*, NABER petition at 8-10 and 47 C.F.R. § 90.635(c).

using the short-spacing Table. Accordingly, we affirm the policies adopted in the *Order* for short-spacing in the identified mountainous regions.

9. We decline to adopt AMTA's proposal that we require an applicant seeking a waiver of our separation rules to identify the 40 dBu contour of the proposed station and the 30 dBu contour of the existing station, in addition to the 30 dBu contour of the proposed station and the 40 dBu contour of the existing station.[13] AMTA claims that such a requirement would limit the ability of entities to file "greenmail" applications -- i.e., insincere applications filed solely for the purpose of thwarting a legitimate licensee's operations. We find AMTA's greenmail scenario to be highly speculative. AMTA has not demonstrated that such filings would likely occur. Further, SMR facilities do not have a prescribed service area and it is not the Commission's position to make a judgment as to the viability of a proposed station's operation. AMTA's proposal would also place a greater burden on both applicants and Commission staff, but would not necessarily deter the filing of greenmail applications. Under AMTA's proposal the potential greenmail applicant could still determine the existing station's 30 dBu contour and select a site that produces a tangential 40 dBu contour and thus prevent the existing licensee from relocating its facility. Moreover, our clarification concerning modifications to facilities that have been short-spaced should make it considerably easier for the existing station to modify its facilities without requesting a waiver.[14] Finally, if the existing station can demonstrate that an applicant has filed a greenmail application, we would view such an action as an abuse of the Commission's processes and impose appropriate sanctions. Accordingly, we will not modify the showings that should be included with a waiver application.[15]

10. We will reconsider the ten-day period provided for affected co-channel licensees to respond to a short-spacing waiver request. As petitioners argue, we believe that ten days may not always be sufficient for all affected licensees to evaluate fully and respond to a short-spacing waiver request.[16] We are, therefore, revising Section 90.621(b), 47 C.F.R. §90.621(b) to provide a thirty-day response period.

11. NABER requests that, because most SMRs operate with between 200 and 500 watts transmitter power,[17] we expand the short-spacing Table to include columns for 300 and 500 watts. While it is not possible to account for all power/height combinations in a tabular form, we agree that additional columns are appropriate and will, therefore, expand the short-spacing Table in Section 90.621(b)(4) of our Rules to include columns for 300 and 500 watts.[18]

12. We decline to impose a two-year moratorium on short-spaced applications as suggested by DiRico.[19] It is highly doubtful that information gained by studying existing short-spaced operations during the moratorium period would yield any useful information. Limited Commission resources would make it very difficult to perform an in-depth study, and any information gleaned from the licensees and users would be likely to be anecdotal in nature. Further, we do not agree with DiRico's suggestion that useful information could be gained by examining Fleet Call's low-power multiple-site operations during the two-year period. Fleet Call was granted a five-year extended implementation period.[20] Therefore, it seems unlikely that, within the two-year period, Fleet Call would be able to operate its proposed system for a long enough time to yield any useful information. Accordingly, there is no public interest benefit in delaying implementation of the rules adopted in the *Order*.

III. CONCLUSION

13. The rules we adopted in the *Order* making short-spacing widely available without the necessity of a waiver request will go far to achieve efficient utilization of the SMR spectrum. The refinements made to those rules herein will help ensure the integrity of existing operations without being overly burdensome, to either existing licensees or applicants.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by the American Mobile Telecommunications Association, Inc. and the National Association of Business and Educational Radio, Inc. are GRANTED to the extent indicated herein and are otherwise DENIED.

15. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by Commercial Engineering Corporation and Francis J. DiRico are DENIED.

16. IT IS FURTHER ORDERED that, pursuant to the authority of Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 303(r), Part 90 of the Commission's Rules, 47 C.F.R. Part 90, IS AMENDED as set fourth in the Appendix below, effective thirty days from the date after publication in the Federal Register.

17. For further information regarding this *Memorandum Opinion and Order* contact Steve Sharkey, Private Radio Bureau, Rules Branch, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[13] AMTA petition at 6-8.

[14] Paragraph 6, *supra*.

[15] *See, Order*, 6 FCC Rcd at nt. 44.

[16] AMTA petition at 9-11. NABER petition at 15. Fleet Call comments at 9-10. SCE comments at 7-8.

[17] NABER petition at 15-16.

[18] At the time the Table was originally prepared, a software program designed to calculate the various separation distances was unavailable. The distances, therefore, were determined through manual calculations. We have now recalculated the distances using the software program and have revised the Table accordingly. The recalculation has resulted in insignificant increases or decreases of between one and three kilometers in 21 of the Table entries.

[19] DiRico petition at 1-7.

[20] Fleet Call, Inc., 6 FCC Rcd 1533, 1535 (1991)

APPENDIX

47 C.F.R. Part 90 of the Commission's Rules is amended as follows:

1. The authority citation for Part 90 continues to read:

AUTHORITY: Sections 4, 303, 331 48 Stat., as amended, 1066, 1082; 47 U.S.C. § 154, 303 and 332 unless otherwise noted.

2. 47 C.F.R. § 90.621 is amended by revising paragraph (b)(1), revising the first sentence of paragraph (b)(3), revising paragraph (b)(4), and adding new paragraph (b)(6) to read as follows:

§ 90.621 Selection and assignment of frequencies.

* * * * *

(b) * * *

(1) Except as indicated in paragraph (b)(4) of this section, no trunked system will be less than 169 km (105 miles) distant from co-channel trunked systems authorized 1 kW ERP on any of the following mountain top sites: Santiago Peak, Sierra Peak, Mount Lukens, Mount Wilson (California).

* * * * *

(3) Except as indicated in paragraph (b)(4) of this section, SMR trunked systems located in the State of Washington at the following locations shall be separated from co-channel systems by a minimum of 169 km (105 miles).
* * *

(4) The following Table indicates permissible distances between co-channel systems separated by less than 113 km (70 miles). Applicants seeking to be licensed for systems located at distances less than those prescribed in the table are required to secure a waiver and to file with their license application a certificate of service indicating that, concurrent with the filing of the application with the Commission, all co-channel licensees within the applicable area were served with a copy of the application and all attachments thereto. Such licensees served with a copy of the application may file an opposition to the application within 30 days from the date the application is filed.

Distance (km) of Proposed Facility from Existing Facility 1/ 2/

Proposed Facility*

DHAAT** (m)	DHAAT** (feet)	ERP (watts) 1000	800	600	500	400	300	200	100	50
30.5	100	108	107	102	98	95	92	87	80	74
61	200	113	111	106	105	103	99	95	89	82
91.5	300	113	113	113	111	108	105	98	95	89
122	400	113	113	113	113	113	109	105	100	92
152.5	500	113	113	113	113	113	112	109	102	97
183	600	113	113	113	113	113	113	113	104	98
213.5	700	113	113	113	113	113	113	113	106	100
244	800	113	113	113	113	113	113	113	108	104
274.5	900	113	113	113	113	113	113	113	110	106
305	1000	113	113	113	113	113	113	113	112	108

* Applicants whose exact ERP and DHAAT are not reflected in the table must use the next higher figure shown. Distances are shown in kilometers.

** The DHAAT is defined as the average of the antenna heights above average terrain from 3 to 16 kilometers (2 to 10 miles) from the proposed site along a radial extending in the direction of the existing station and the radials 15 degrees to either side of that radial.

1/ Separations for trunked systems on Santiago Peak, Sierra Peak, Mount Lukens, and Mount Wilson (California) and the locations in the State of Washington listed in 47 C.F.R. § 90.621(b)(3) are 56 km (35 miles) greater than those indicated in the table above. In the event of a conflict between this table and 47 C.F.R. § 90.621(b)(2)(ii), the later will control.

2/ The distances shown are based on a non-overlap of the 22 dBu interference contour of the proposed station with the 40 dBu service contour of the existing station(s). No consideration has been given between the 40 dBu service contour of the proposed station and the 22 dBu interference contour of the existing station(s).

* * * * *

(6) A station located closer than the distances provided in paragraphs (b)(1) and (b)(3) of this section to a co-channel station that was authorized as short-spaced under paragraph (b)(4) of this section shall be permitted to modify its facilities without regard to the short-spaced station so long as it does not extend its 30 dBu interfering contour in the direction of the short-spaced station's 40 dBu contour beyond what the 30 dBu contour would be if the station had been operating with maximum facilities.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 8, 1992

COMMISSION ANNOUNCES ORAL PRESENTATION SCHEDULE FOR *EN BANC* HEARING ON TOLL FRAUD

In a Public Notice dated August 7, 1992, the Commission indicated its intention to hold an *En Banc* hearing to hear oral presentations on Toll Fraud issues. The hearing will be held on Friday, October 9, 1992, at the Commission's offices at 1919 M Street, N.W., Washington, D.C., in Room 856. The schedule is as follows:

MORNING SESSION

9:00 - 9:15: Introductory Remarks by the Chairman and Commissioners

9:15 - 10:00: Panel No. 1: PBX and Other CPE-based Fraud

- PBX/CPE Owners

Leucadia National Corporation

Agway, Inc. (International Communications Association) - Lawrence J. Gessini

-Law Enforcement Expert

Communications Fraud Control Association

- Equipment/Software Manufacturer on Vulnerabilities and Solutions

Northern Telecom

-New Anti-Fraud Services

LDDS Communications, Inc. - Don Chessher

10:00 - 10:30: Commissioners' Questions and Comments

10:30 - 10:45: Break

10:45 - 11:30: Panel No. 2: Network-based Toll Fraud, Responsibility, and Liability Questions

- Hacker Expert

William J. Cook, Esq.

-Fraud Migration in the Network and Solution

Toll Fraud Prevention Committee of the Exchange Carriers Standards Association - Mary Chacanias (Bell Atlantic) and Bill Sushon (AT&T)

- Payphone Manufacturer on Equipment-based Solutions

Intellicall, Inc. - B. Reid Presson

- LIDB and Blocking/Screening Services

Bellcore - Jim Frankowski

11:30 - Noon: Commissioners' Questions and Comments

AFTERNOON SESSION

1:30 - 1:35: Introductory Remarks by the Chairman

1:35 - 2:30: Panel No. 3: Emerging Technical, Law Enforcement and Business Solutions to Domestic and International Toll Fraud

- New Anti-Fraud Products

VOTAN - Dr. Steven Gill

- Law Enforcement Expert on Detection and Prevention of Fraud

Federal Bureau of Investigation - James Kallstrom

- International Representative

Stentor Telecom Policy Inc.

- Negotiation of International Fraud Disputes

Stuart N. Brotman

- Contractual and Insurance Protection

Sprint - Robert F. Fox

MCI - Edward J. O'Malley

AT&T - Peter Coulter

Travelers Insurance Co.

2:30 - 2:55: Commissioners' Questions and Final Comments

2:55 - 3:00: Chairman's Final Remarks

Panelists are requested to submit a short biography, a description of whom they represent, and a written copy of their presentation by September 18, 1992. Other interested parties may also submit written statements by September 18, 1992. Mail materials to: Linda Dubroof, Domestic Facilities Division, Common Carrier Bureau, Federal Communications Commission, 2025 M Street, N.W., Room 6008, Stop Code 1600B2, Washington, D.C. 20554; or fax to: (202) 634-6625.

The hearing will be open to the public. Common Carrier Bureau contacts: Linda Dubroof at (202) 634-1808/Fax: (202) 634-6625, or Kurt Schroeder at (202) 632-4887. News Media Division contact: Stephen Svab at (202) 632-5050.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 21

Revised: September 8, 1992

Released: September 8, 1992

Responsible Accounting Officer

Re: Classification of Remote Central Office Equipment for Accounting Purposes.

We believe that some carriers are improperly classifying remote switches as circuit equipment rather than as switching equipment as required under Part 32. The inconsistency among carriers in classifying remote switches appears to be the result of confusion between a remote switch and a remote terminal of a concentrator. In order to increase uniformity in the Part 32 classification of remote switches, we are issuing definitions in this letter to differentiate between a remote switch and a remote terminal of a concentrator. This letter is limited to defining a remote switch and a remote terminal of a concentrator because that appears to be the area of confusion; it does not cover any other remote central office equipment.

Remote Switch: A unit that performs some, but not necessarily all, of the basic switching functions.[1] The remote switch may be wholly or partially controlled by a control unit or processor located in another switch, i.e., the "host" switch, but it is classified as a switch if the capability to provide a switched path is at the remote location. The remote switch may depend on the host switch for such functions as routing, billing, traffic measurement and custom calling. Calls between subscribers served by the same remote switching unit can be switched in the remote unit. When this occurs, the voice path does not extend to the host switch; however, a link to the host switch may be required for call control purposes. The Commission's rules require that the cost of remote switches be included in Account 32.2211, Analog electronic switching, or Account 32.2212, Digital electronic switching.[2]

Remote Terminal of a Concentrator: A concentrator consolidates subscriber lines, and thereby facilitates the use of lesser amounts of loop plant to serve a greater number of end users. A concentrator has a terminal located at the central office and a remote terminal. All calls are switched by the central office switch to which the concentrator is connected. The voice path will always extend to the host switch even for calls between subscribers served by the same remote terminal of a concentrator. If the voice path or control link between the central office and the remote terminal fails, service will be interrupted even for calls between subscribers served by the same remote terminal. The Commission's rules require that the cost of equipment used to reduce the amount of loop plant otherwise required to serve a given number of subscribers by utilizing carrier systems, concentration stages or combinations of both is to be included in Account 32.2232, Circuit equipment.[3]

The distinguishing attribute between a remote switch and a remote terminal of a concentrator is that a remote switch can provide the switched path for calls between its directly connected local subscribers and a remote terminal of a concentrator cannot. A remote terminal of a concentrator depends on the host switch to switch all calls and the voice path always extends to the host switch.

This Responsible Accounting Officer letter supersedes RAO Letter 21 as issued August 7, 1992, and is issued pursuant to authority delegated under §0.291 of the Commission's Rules, 47 C.F.R. §0.291. Petitions for reconsideration under Section 1.106 of the Commission's Rules, 47 C.F.R. §1.106, and applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, must be filed within 30 days of the date of this letter. *See* 47 C.F.R. §1.4(b)(2).[4]

If you have any questions, please contact Gary Seigel at (202) 634-1861.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

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[1] The basic switching functions are: 1) *Attending* - monitors for off-hook signals; 2) *Control* - determines call destination and assigns call to available line or trunk; 3) *Busy testing* - determines whether the called line/trunk is busy; 4) *Information receiving* - receives control and busy test results; 5) *Information transmitting* - transmits control and busy test results to tell the alerting and interconnection functions whether to complete the call; 6) *Interconnection* - connects subscriber line to subscriber line or subscriber line to trunk; 7) *Alerting* - rings the called subscriber's line or other signalling means if the call is destined for another exchange; 8) *Supervising* monitors for call termination so the line can be released. *See, e.g., Telecommunication System Engineering,* Second Edition, Roger L. Freeman, Wiley Interscience, 89-90 (1989).

[2] *See* 47 C.F.R. §§32.2211-32.2212. Class B companies would record these costs in Account 32.2210, Central office-switching. *See* 47 C.F.R. §32.2210.

[3] *See* 47 C.F.R. §32.2232. Class B companies would record these costs in Account 32.2230, Central office-transmission. *See* 47 C.F.R. §32.2230.

[4] In view of this action, we hereby dismiss without prejudice the petition for reconsideration filed September 1, 1992, by Shenandoah Telephone Company and the request for clarification filed September 4, 1992, by the National Exchange Carrier Association, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US West Communications, Inc. AAD 92-45

and

Emery County Farmers' Union
Telephone Association

Joint Petition for Waiver of
Sections 36.125(f) and
36.154(e)(1) and (2), and
the Definition of "Study Area"
contained in Part 36, Appendix-
Glossary, of the Commission's Rules

and

Emery County Farmers'
Union Telephone Assoc.

Petition for Waiver of Sections 61.41(c)
and 69.3(e)(11) of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1992; Released: September 11, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

1. In this Order we consider a joint petition filed by US West Communications, Inc. (US West) and Emery County Farmers' Union Telephone Association, Inc. (Emery) for waiver of the Commission's rules regarding a study area change.

I. INTRODUCTION AND BACKGROUND

2. On June 10, 1992, US West and Emery filed a joint petition for waiver of the definition of study area and of accompanying rules.[1] Emery filed a petition for waiver of Sections 61.41(c) and 69.3(e)(11) on June 15, 1992, and the parties filed a supplement to the joint petition on June 18, 1992. We placed this petition on public notice on June 30, 1992, and received opposition to the joint petition from Beehive Telephone Company (Beehive), and comments in support of the request from the United States Telephone Association (USTA). Both US West and Emery filed replies to the Beehive opposition.

II. STUDY AREA WAIVER

3. The definition of study area contained in Part 36, Appendix-Glossary,[2] of the Commission's Rules states that study area boundaries shall be frozen as they were on November 15, 1984. Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[3] that the state commission(s) having regulatory authority not oppose the change,[4] and that the public interest be served.

4. The service area in question here, the Huntington exchange, is being sold by US West to Emery. The exchange consists of 788 access lines. The parties state that this transaction will have no impact on high cost fund support or on the separations factors.

A. Universal Service Fund (USF) Impact

5. USF support is calculated based on the cost per loop. Both US West and Emery have costs per loop below the national average, and thus neither requires high cost assistance.[5] The transfer of the Huntington exchange does not change this. Although the Beehive opposition charges that US West is getting rid of a high cost area, which will then require high cost support, Beehive offers no evidence that this is so.[6] The joint petition states that neither company currently receives USF support, and that neither company will receive USF support after the study area change. It is clear from this showing that this transfer does not have an adverse impact on the USF support program.

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[1] Sections 36.154(e) and 36.125(f) of the Commission's rules, which describe allocation calculations, as discussed below.

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65 (December 12, 1984) (*Joint Board Order*).

[4] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[5] US West's average loop cost in the Utah study area prior to the sale of the Huntington exchange was $178.12, well below the national average loop cost of $231.09. Following the sale, US West-Utah average loop cost decreases by about $0.11. Emery's average loop cost, including the Huntington exchange, is $216.61, also below the national average, and substantially below the high cost support threshold. Joint Petition at 3-4.

[6] US West's showing in the Joint Petition establishes that the sale of the Huntington exchange does affect US West's average loop cost in Utah, decreasing it by some 11 cents. But Emery's acquisition of the Huntington exchange does not elevate Emery's average loop cost to a level that would justify high cost support.

B. State commission approval

6. The supplemental filing made on June 18, 1992, contains the Order of the Public Service Commission of Utah approving this transaction.[7] This commission action addresses our concerns regarding state approval.

III. SEPARATIONS FACTOR WAIVER

7. The joint petition states that no waiver of Sections 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), relating to the computation of the interstate allocation factor, Subscriber Plant Factor (SPF), is needed. In the case of both US West and Emery, the transition to 25% will be complete by the end of 1992.

8. The petition requests waiver of Section 36.125(f), 47 C.F.R. §36.125(f), relating to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period, to the extent a waiver is required.[8] US West states that the Huntington exchange constitutes a *de minimis* part of US West's Utah access lines (about 1/10 of one percent), and that it will seek no changes in COE Category 3 apportionment following this transaction.[9] Emery calculates its Category 3 factors for 1991 through the end of 1992, when the transition to DEM will be complete.[10]

9. We have reviewed US West's and Emery's SPF and DEM showings, and we find that no waiver is needed regarding SPF, and that the parties have reasonably and acceptably adjusted DEM to reflect the transaction here proposed, while complying with the Commission's rules. We find that the proposed revisions to the factors will produce no material effect on separations.

IV. PRICE CAPS WAIVER

10. On June 15, 1992, Emery filed a petition for a declaration of inapplicability of the Commission's rules governing the acquisition of price cap companies by non-price cap companies, or alternatively, for waiver of those rules. Only Beehive commented on this petition.[11] Both Emery and US West replied.

11. Section 61.41 of the Commission's Rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[12] Under this rule, Emery's acquisition of the US West exchange obligates it to exit the NECA pools and become subject to price cap regulation. Emery requests waiver of this rule because the rule's application here would be contrary to the public interest. Emery notes that a major factor in the Utah commission's approval of the transfer and sale was Emery's commitment to upgrade the quality of local exchange service in Huntington by installing a digital switch. Emery states that it is a small cost company and participates in the NECA pool, and that continued participation in the pools is essential to the financial integrity of the company and the maintenance of telephone service to its rural and smalltown customer base.

12. Further, Emery states, it has no incentive, ability, or inclination to "game" the Commission's price cap policies. Emery accordingly requests a waiver of the §61.41 "all or nothing" rule and of the concomitant effects of §69.3. Emery notes that there is no relationship between US West and Emery that would allow either company to shift costs as a consequence of this sale, and that neither is using this sale as a means of choosing a different system of regulation than the *status quo*. Finally, Emery states that a requirement that Emery withdraw from the NECA pools and operate as a price cap company would subject Emery to administrative and financial burdens that would jeopardize the company's ability to meet its technological upgrade commitments to customers.

13. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[13] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift its costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706. The Commission stated, however, that "in some cases, the efficiencies created by the pur-

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[7] Docket No. 91-042-02, Order Amending Certification, issued June 16, 1992.

[8] Section 36.125(f), 47 C.F.R. §36.125(f), relates to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period (1988 through 1992). This transition is from a frozen (1987) composite allocator to a dial equipment minutes (DEM) allocator.

[9] US West calculates that its allocation factor will change from an estimated 15.804% to 15.807% interstate resulting from the sale of the Huntington exchange.

[10] Emery states that it develops its COE Category 3 "B" component using the composite DEM for exchanges, and will calculate the "A" component using Emery's 1987 year-end percent interstate Categories 4-7, pursuant to Part 36 of the Commission's rules. Joint Petition at 6. We note that for 1992, the "A" component is only 10% of the allocator, and that the "A" component disappears at the end of 1992.

[11] We note that that comment was indirect, and was filed against US West's sale and proposed removal from price cap regulation of the Huntington exchange, rather than against Emery's acquisition of the exchange.

[12] 47 C.F.R. §61.41(c)(2). Emery also requests waiver of a related rule, Section 69.3(e)(11), to allow Emery to remain in the NECA pools. Section 69.3(e)(11) states that "any changes in Association common line tariff participation and Long Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction...."

[13] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order), modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order), petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

chase and sale of one or two exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule." *Id.* at note 207.

14. There is good cause to grant Emery a waiver of the all-or-nothing rule. The first concern cited by the Commission -- cost-shifting between affiliates -- is not at issue here. Neither Emery nor US West is seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts of this case. Except for the exchange it has sold to Emery, US West remains regulated under price caps; it retains no ability to bring this single exchange back under price caps.

15. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[14] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers below the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE and the Regional Bell Companies, our application of the all-or-nothing rule must take into account the companies' preference, particularly for small carriers.

16. We therefore grant a waiver of the all-or-nothing rule. For the present, Emery will be regulated under rate of return. Emery also requests waiver of Section 69.3, to allow it to remain a participant in the NECA pools. *See* note 12, *supra*. Because we are waiving Section 61.41, allowing Emery to remain under rate of return regulation, Emery need not withdraw from the NECA pools, and Section 69.3 is not triggered, so no waiver is necessary. As with any other rate of return carrier, Emery will be free to elect price cap regulation in the future, provided it withdraws from the NECA pools.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of US West Communications, Inc. and Emery County Farmers' Union Telephone Association, Inc. for waiver of Sections 36.125(f) and 36.154(e), and of Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED to the extent set forth above.

18. IT IS FURTHER ORDERED that the Petition of Emery County Farmers' Union Telephone Association, Inc., for waiver of Section 61.41(c)(2) of the Commission's Rules, 47 C.F.R. Section 61.41(c)(2), IS GRANTED.

19. IT IS FURTHER ORDERED that the Petition of Emery County Farmers' Union Telephone Association, Inc., for waiver of Section 69.3(e)(11) of the Commission's Rules, 47 C.F.R. Section 69.3(e)(11), IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

[14] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988) (*Small Company Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: September 18, 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David Macejko 8310-GU
Vice President and General Manager C3-17
Great Trails Broadcasting Corp. C4-673
Licensee, Radio Station WGTZ-FM
717 E. David Road
Dayton, OH 45429

Dear Mr. Macejko:

This letter constitutes a Notice of Apparent Liability for a Forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules, for willful violation of Section 73.1206 of the Commission's Rules.

On March 3, 1992, the Commission received a letter from William W. Lambert, counsel for Vickie L. Isaacs, alleging that on December 16, 1991, Ms. Isaacs was awakened by a telephone call. He states that Ms. Isaacs answered the phone, greeted the caller, and was then told that she was already "on the air. " He further states that Ms. Isaacs was then asked whether that was "okay," but was not given a meaningful opportunity *not* to be on the air.

Based on this complaint, the Commission sent you a letter of inquiry on March 24, 1992. In your April 27, 1992, response, you admit that the conversation to which our letter of inquiry refers was broadcast on WGTZ by former morning air personalities Michael Otto and Sandra L. Sloan. You further assert that, based on the transcript you supplied, Mr. Otto simply asked the party he was calling, "Is this Vickie?" and immediately thereafter identified himself and informed Ms. Isaacs that the call was on the air. You also assert that Mr. Otto gave Ms. Isaacs the affirmative opportunity to decline to participate, by telling her they were on the air and asking, "Is that okay?" She replied, "Yes." You state that he then advised Ms. Isaacs that the call was not a prank, and repeated, "you really are on the radio." Finally, you state your belief that the episode reflects Ms. Isaacs was given full and fair opportunity to decline to speak on the air. You also recognize that, by its terms, Section 73.1206 requires a licensee to inform a party of the licensee's intention to broadcast a telephone conversation before it is actually broadcast. You argue that, although Mr. Otto informed Ms. Isaccs of his intention to broadcast the conversation as it was being broadcast -- rather than prior to broadcast -- this was done immediately upon Mr. Otto's having confirmed that he had reached the party he was calling.

Based on the foregoing, and by your own admission, Radio Station WGTZ-FM broadcast a telephone conversation, without first having provided the requisite notice of the intent to broadcast the conversation in willful violation of Section 73.1206 of the Commission's Rules. Therefore, it appears that a forfeiture is appropriate.

Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Great Trails Broadcasting Corp., licensee of Radio Station WGTZ-FM, Eaton, OH, is hereby advised of its Apparent Liability for Forfeiture in the amount of $5,000 for its apparent willful violation of Section 73.1206 of the Commission's Rules as set forth above.

The amount specified for the forfeiture was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), *recon. denied,* FCC 92-212, (released June 4, 1992). Under these standards, $5,000 is the base forfeiture for the violation of broadcasting telephone conversations without notice.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Notice of Apparent Liability.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICALL SYSTEMS OF LOUISVILLE,
Complainant,

v.

BELL TELEPHONE COMPANY OF PENNSYLVANIA, and — File No. E-91-014
CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, — File No. E-91-015
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: September 11, 1992; Released: September 18, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1990, Americall Systems of Louisville (Americall) filed the above-captioned formal complaints against Bell Telephone Company of Pennsylvania and Chesapeake and Potomac Telephone Company (collectively "Defendants") seeking damages resulting from Defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988. On September 3, 1992, however, Americall filed a motion for leave to withdraw the complaints stating that it is not economically prudent for it to continue pursuit of these complaints and there is no longer any necessity for these proceedings.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.[1]

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Americall's Motion for Leave to Withdraw Complaint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED and the proceedings ARE TERMINATED.

5. IT IS FURTHER ORDERED that Americall's Application for Review IS DISMISSED.

[1] Americall filed an application for review of an order holding these complaints in abeyance. *Order*, 6 FCC Rcd 698 (Com.Car.Bur. 1991). Because the complaints are being withdrawn, the application for review is moot and will be dismissed accordingly.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Chautauqua & Erie Telephone Corporation AAD 91-73

and

New York Telephone Company

Petition for Waiver
of the Definition of
"Study Area" contained in
Part 36, Appendix-Appendix-
Glossary, of the Commission's Rules

and

Chautauqua & Erie
Telephone Corporation

Petition for Waiver
of Sections 36.125(f),
36.154, and 61.41(c)
of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 1992; Released: September 14, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

1. On October 29, 1991, and October 25, 1991, Chautauqua & Erie Telephone Corporation (Chautauqua) and New York Telephone Company (New York), respectively, filed petitions for waiver of the Commission's definition of "study area" and of accompanying rules.[1] Chautauqua also petitioned for waiver of rules relating to the study area waiver, and for waiver of rules relating to price cap regulation. We placed these petitions on public notice on November 26, 1991, and received comments in support of the request from two parties.[2] On July 31, 1992, Chautauqua filed a supplement to its petition, and on August 4, 1992, New York filed a supplement to its petition.

I. STUDY AREA WAIVER

2. The definition of study area contained in Part 36, Appendix-Glossary,[3] of the Commission's rules states that study area boundaries shall be frozen as they were on November 15, 1984. Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[4] that the state commission(s) having regulatory authority not oppose the change,[5] and that the public interest be served.

3. The service area in question here, the South Ripley exchange, is being transferred from New York to Chautauqua. It serves 115 business and residential customers. Chautauqua serves some 9500 customers.

Universal Service Fund (USF) Impact

4. One of the Commission's concerns in freezing study areas at their November 1984 status was that companies might try to manipulate the high cost fund. USF support is calculated based on the cost per loop, and a carrier could create a high cost study area (to qualify for higher USF support) by redrawing boundaries. Here, however, Chautauqua states that it does not receive USF support, and that it will not receive USF support after its acquisition of the South Ripley exchange. In fact, according to Chautauqua's Petition at Attachment 1, Chautauqua's cost per line will decline by nearly three dollars with the South Ripley acquisition. It is clear from this showing that this transfer does not produce an adverse impact on the USF.

State commission approval

5. The supplements filed by the two parties contain a New York Public "Service Commission order granting their joint petition for transfer and sale.[6] This commission action addresses our concerns regarding state approval.

II. SEPARATIONS FACTOR WAIVER

6. The petition requests waivers to the extent necessary of Sections 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), relating to the computation of the interstate allocation factor, Subscriber Plant Factor (SPF).[7] Chautauqua requests a waiver to allow it to revise the 1981 base-year SPF based on the original 1981 frozen subscriber line

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[1] Sections 36.154(e) and 36.125(f) of the Commission's rules, which describe allocation calculations, as discussed below.

[2] Public Notice, DA 91-1405, released Nov. 26, 1991. Comments filed by the National Exchange Carrier Association (NECA) and the United States Telephone Association (USTA) support the request.

[3] 47 C.F.R. Part 36, Appendix-Glossary.

[4] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325, at para. 65 (December 12, 1984) (*Joint Board Order*).

[5] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[6] New York State Public Service Commission Order in Case 92-C-0033, released July 28, 1992.

[7] Section 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), refers to Section 36.154(d) and relates to the computation of the Subscriber Plant Factor (SPF), which is used to effect the transition (1988 to 1992) to 25 percent allocation to interstate for Category 1.3, CW&F, and subscriber loop plant. This transition period may extend beyond the end of 1992 because annual transition rates are capped at 5 percent per year.

usage (SLU) minutes for the modified study area and calculated in accordance with Part 36 of the Commission's rules. Chautauqua also requests waiver of Section 36.125(f), 47 C.F.R. §36.125(f), relating to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period.[8] We have reviewed Chautauqua's SPF and DEM showings, and we find that no waiver of either rule is needed. The transitions to 25% SPF and to DEM will be complete by the end of calendar year 1992, and the proposed transaction will therefore produce no material effect on separations.

III. PRICE CAP "ALL OR NOTHING" WAIVER

7. Chautauqua also requests waiver of the Commission's rules governing the acquisition of price cap companies by non-price cap companies. Section 61.41 of the Commission's rules provides that when a non-price cap company acquires a price cap company or any part thereof, the acquiring company shall become subject to price cap regulation.[9] Under this rule, Chautauqua's acquisition of the New York Tel. exchange obligates it to exit the NECA pools and become subject to price cap regulation. Chautauqua requests waiver of this rule because the rule's application here would be contrary to the public interest, and states that this is a situation such as the Commission stated in which "the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of 'gaming the system'."[10]

8. The Commission's rules governing mergers and acquisitions provide that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company must comply with price cap regulation within a year of the transaction.[11] The rationale for this rule is stated in the *LEC Price Cap Reconsideration Order*. First, in the absence of the rule, a company might attempt to shift its costs from its price cap affiliate to its rate of return affiliate, allowing the rate of return affiliate to earn more (because of its greater revenue requirement) without affecting the earnings of the price cap affiliate (*i.e.*, without triggering the sharing mechanism). Second, if a LEC were allowed to go back and forth between rate of return regulation and price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opting for price caps again and cutting its costs to an efficient level. *LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, 2706 (cites omitted). The Commission stated, however, that "in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of 'gaming the system.' Such cases might justify narrow waiver of the all-or-nothing rule." *Id.* at note 207.

9. There is good cause to grant Chautauqua a waiver of the all-or-nothing rule. The first concern cited by the Commission -- cost-shifting between affiliates -- is not at issue here. Neither Chautauqua nor New York Tel. is seeking to maintain separate affiliates under different systems of regulation. The second concern underlying the rule -- allowing a company to use mergers and acquisitions as a means of choosing regulatory systems and "gaming" -- is also not raised on the facts of this case. Except for the exchanges it has sold to Chautauqua, New York Telephone remains regulated under price caps; it retains no ability to bring this single exchange back under price caps.

10. Further, the Commission has always been sensitive to the administrative burdens imposed on small carriers by the application of Commission rules.[12] In the *LEC Price Cap Order*, the Commission recognized that small telephone companies should not be forced into a regulatory regime that was designed based largely on the historical performance of the largest local exchange carriers. The Commission therefore made price cap regulation optional for carriers below the largest eight. Given the Commission's reservations about mandatory application of the price cap plan to carriers other than GTE "and the Regional Bell Companies, our application of the all-or-nothing rule must take into account the companies' preference, particularly for small carriers.

11. We therefore grant a waiver of the all-or-nothing rule. Chautauqua will continue to be regulated under rate of return. Chautauqua will be free to elect price cap regulation in future, provided it withdraws from the NECA pools.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Petitions of Chautauqua and Erie Telephone Corporation and New York Telephone Company for waiver of Appendix-Glossary of Part 36 of the Commission's Rules ARE GRANTED to the extent set forth above.

13. IT IS FURTHER ORDERED that the petition of Chautauqua & Erie Telephone Corporation for waiver of Sections 36.125(f) and 36.154(e) of the Commission's rules, 47 C.F.R. §§36.125(f) and 36.154(e), IS DISMISSED.

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[8] Section 36.125(f), 47 C.F.R. §36.125(f), relates to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period (1988 through 1992). This transition is from a frozen (1987) composite allocator to a dial equipment minutes (DEM) allocator.

[9] 47 C.F.R. Section 61.41(c)(2). Section 69.3(e)(11) states that "any changes in Association common line tariff participation and Long Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction...."

[10] Chautauqua Petition at 4, *citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637 (1991) at xxxx, n.207.

[11] Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[12] *See, e.g.*, Regulation of Small Telephone Companies, CC Docket No. 86-467, Notice of Proposed Rulemaking, 2 FCC Rcd 1010 (1986); Report and Order, 2 FCC Rcd 3811 (1987); Order on Reconsideration, 3 FCC Rcd 5770 (1988) (*Small Company Order*).

14. IT IS FURTHER ORDERED that the petition of Chautauqua & Erie Telephone Corporation for waiver of Section 61.41(c) of the Commission's rules, 47 C.F.R. §61.41(c), IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 1, 1992

COMMON CARRIER BUREAU RELEASES UPDATED INFORMATION IN PRICE CAP PERFORMANCE REVIEW FOR AT&T (CC DOCKET NO. 92-134); DISCUSSES PROCEDURES FOR FILING COPIES OF COMMENTS ON PC-COMPATIBLE DISKETTES

In an Appendix to the Notice of Inquiry opening the price cap performance review for AT&T (*Price Cap Performance Review for AT&T,* CC Docket No. 92-134, FCC 92-257), the Commission released data on AT&T's performance under price cap regulation as of the time the Notice was adopted, on June 18, 1992. The Commission also indicated that it would provide more complete data on AT&T's performance during the first three years of price cap regulation, July 1, 1989 through June 30, 1992, when this data became available. As part of its monitoring program, the Common Carrier Bureau has now compiled this data. We are therefore releasing an updated Appendix as part of this Public Notice.

Comments in this docket are currently due on **September 4, 1992,** replies on **October 5, 1992.** We remind commenters that the Commission is using this proceeding as a test of methods to improve the ability of the Commission and the public to review and evaluate data and information, by including them in computerized read-only data bases. We encourage commenters to submit an additional copy of their comments to the Secretary's Office in a form that will permit their inclusion in this data base, specifically on one or more IBM-PC compatible diskettes with text files compatible with WordPerfect 5.1 or 4.2 and spreadsheets compatible with Lotus 1-2-3. We currently plan to maintain the data base in the Common Carrier Bureau Industry Analysis Division Bulletin Board. We also encourage comments and suggestions for improvements to these procedures, in order to facilitate the creation of useful data bases.

For further information, please call Dan Grosh, Tariff Division, (202) 632-6387.

FEDERAL COMMUNICATIONS COMMISSION

Appendix

Chart 1

AT&T's Price Caps Indices

by Basket and Band

(June 30, 1989 – July 1, 1992)

Index by Basket and Band	June 30, 1989 *	July 1, 1990			July 1, 1991			July 1, 1992		
	Index	Upper Band	Index	Lower Band	Upper Band	Index	Lower Band	Upper Band	Index	Lower Band
asket 1										
Price Caps Index	**96.6**	--	**94.3**	--	--	**94.1**	--	--	**94.4**	--
Actual Price Index	**98.4**	--	**94.3**	--	--	**93.6**	--	--	**94.3**	--
Residential Index	**98.8**	95.5	**94.5**	--	95.5	**94.1**		95.4	**94.5**	--
Service Band Indices :										
Day	**95.7**	95.5	**91.8**	86.3	94.2	**89.2**	85.2	96.5	**91.9**	87.3
Evening	**99.5**	98.8	**91.4**	90.1	94.5	**90.9**	86.4	93.4	**89.8**	85.3
Night/Weekend	**99.6**	102.4	**99.9**	93.4	106.3	**102.2**	97.1	106.3	**102.2**	97.1
International	**99.2**	98.3	**94.6**	88.8	99.4	**94.5**	89.9	99.4	**94.7**	90.0
Operator and Card	**98.6**	100.6	**98.7**	90.9	103.9	**96.4**	94.0	104.5	**99.5**	94.5
Reach Out America	**97.1**	94.6	**88.5**	85.5	93.2	**88.4**	84.4	91.3	**86.9**	82.6
asket 2										
Price Caps Index	**96.8**	--	**94.0**	--	--	**93.8**	--	--	**94.1**	--
Actual Price Index	**97.3**	--	**92.8**	--	--	**93.4**	--	--	**92.5**	--
Service Band Indices:										
AT&T 800	**98.4**	98.3	**94.7**	88.8	100.4	**95.3**	90.8	97.0	**92.1**	87.8
Directory 800 **	--	--	--	--	103.3	**100.0**	95.3	106.6	**103.6**	98.4
MEGACOM 800	**92.3**	88.5	**85.3**	80.0	90.4	**85.8**	81.8	91.5	**85.2**	82.8
Other 800	**100.0**	96.3	**90.0**	87.0	93.7	**89.0**	84.8	93.4	**89.0**	84.5
READYLINE 800	**96.5**	93.9	**90.2**	84.8	96.0	**91.1**	86.8	98.7	**93.4**	89.3
iginal Basket 3 * **										
Price Caps Index	**98.3**	--	**96.7**	--	--	**97.3**	--	--	--	--
Actual Price Index	**96.9**	--	**93.1**	--	--	**95.9**	--	--	--	--
Service Band Indices :										
AT&T WATS	**94.8**	99.2	**94.7**	89.8	104.9	**99.0**	94.9	--	--	--
MEGACOM	**92.8**	92.9	**88.6**	84.0	95.7	**90.4**	86.6	--	--	--
Other Switched	**100.2**	104.2	**99.0**	94.3	102.9	**97.1**	93.1	--	--	--
Other Private Line	**99.2**	79.8	**76.1**	72.2	83.1	**78.3**	75.2	--	--	--
PRO WATS	**96.1**	95.8	**91.1**	86.7	98.3	**92.8**	88.9	--	--	--
SDN	**81.9**	80.7	**76.8**	73.0	82.0	**77.8**	74.2	--	--	--
Voice Grade Private Line	**101.2**	103.0	**98.1**	93.2	108.9	**102.8**	98.5	--	--	--
estructured Basket 3 * **										
Price Caps Index	--	--	--	--	--	--	--	--	**102.8**	--
Actual Price Index	--	--	--	--	--	--	--	--	**97.9**	--

urce: FCC, Common Carrier Bureau, Tariff Division.

* The values of indices on June 30, 1989 are those that immediately preceded price caps regulation: Indices were initiated at 100.0 on December 31, 1988 and price caps regulation began on July 1, 1989.

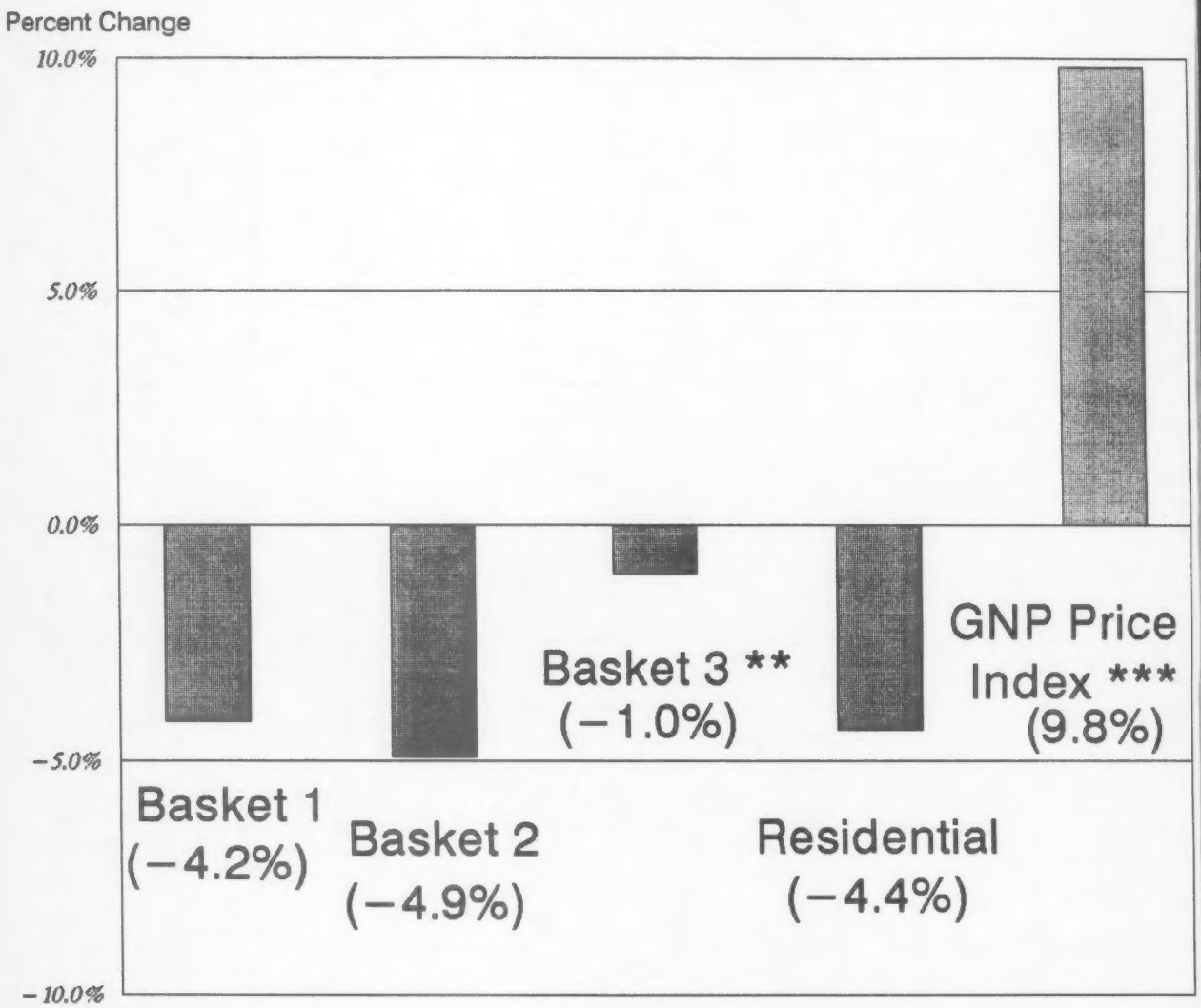
** The Directory 800 band was added to price caps regulation on July 1, 1991.

*** Basket 3 indices were reinitiated to 100.0 on August 1, 1991, when Basket 3 was restructured to include only private-line-analog services.

Chart 2

Comparison of Change in AT&T's Price Indices * to Change in GNP Price Index

July 1, 1989 – June 30, 1992



Sources: Chart 1 except for the GNP Price Index (GNP–PI). The GNP–PI is from the Bureau of Economic Analysis, Department of Commerce, Survey of Current Business, various volumes.

* Price indices are the Actual Price Index (API) in each basket and the Basket 1 Residential Index.

** Represents change over two years ending June 30, 1991. An abbreviated period is shown, because most services in Basket 3 were removed from price caps in November 1991.

*** Represents change over the period beginning 3rd Quarter 1989 and ending 1st Quarter 1992. An abbreviated period is used, because GNP–PI data is not yet available beyond 1st Quarter 1992.

Chart 3

Consumer Benefits from Below–Caps Pricing and Consumer Dividends

(Millions of Dollars)

Row	Item	1st Price Caps Year	2nd Price Caps Year	3rd Price Caps Year	4th Price Caps Year ***	Total **
1.	Amount by which AT&T has exceeded regulatory requirements by pricing below the cap	$258	$205	$205	$74	$742
2.	Consumer Productivity Dividend	$85	$179	$269	$286	$819
3.	TOTAL CONSUMER BENEFIT *	$343	$384	$474	$360	$1,561

Source: FCC, Common Carrier Bureau, Tariff Division.

* Equals Row 1 plus Row 2.

** Equals the sum of the years.

*** Year 4 consumer benefit is lower than the previous year, due to the removal of all services except private–line–analog services from Basket 3.

Notes:

1st Price Caps Year is December 31, 1988 through July 1, 1989.
2nd Price Caps Year is July 2, 1989 through July 1, 1990.
3rd Price Caps Year is July 2, 1990 through July 1, 1991.
4th Price Caps Year is July 2, 1991 through July 1, 1992.

Chart 4

AT&T's Interstate Rate of Return

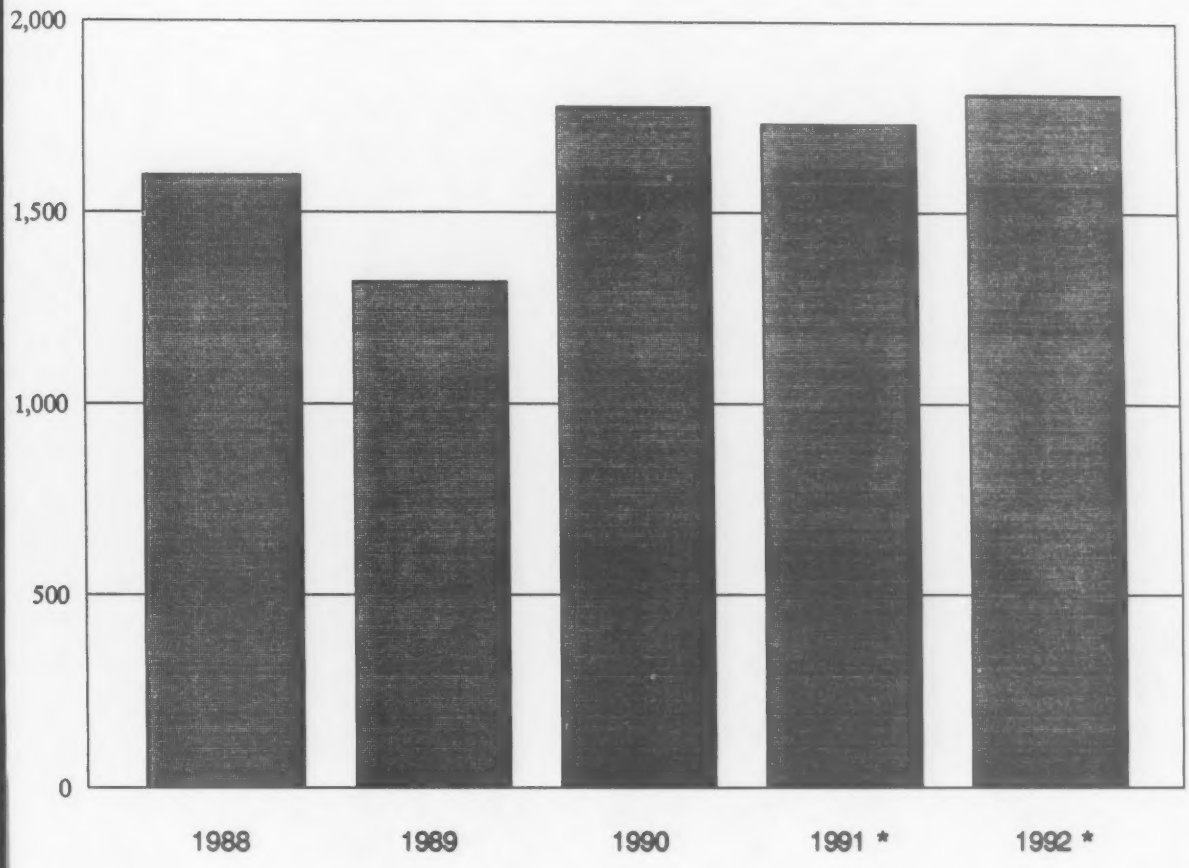
(Thousands of Dollars)

Row	Item	1989	1990	1991
1	Total Revenues	$25,945,517	$25,204,356	$25,672,542
2	Total Expense & Taxes	$24,719,988	$23,666,092	$24,177,121
3	Net Earnings	$1,225,529	$1,538,264	$1,495,420
4	Rate Base (Avg. Net Investment)	$11,145,915	$11,207,433	$11,151,312
5	Rate of Return (Percent)	11.00%	13.73%	13.41%

Source: FCC, Common Carrier Bureau, AT&T's Interstate Rate of Return Report, 1991, 1990, 1989.
Notes:
Row 3: Row 1 minus Row 2.
Row 5: Row 3 divided by Row 4.

Chart 5

AT&T's Circuit Counts



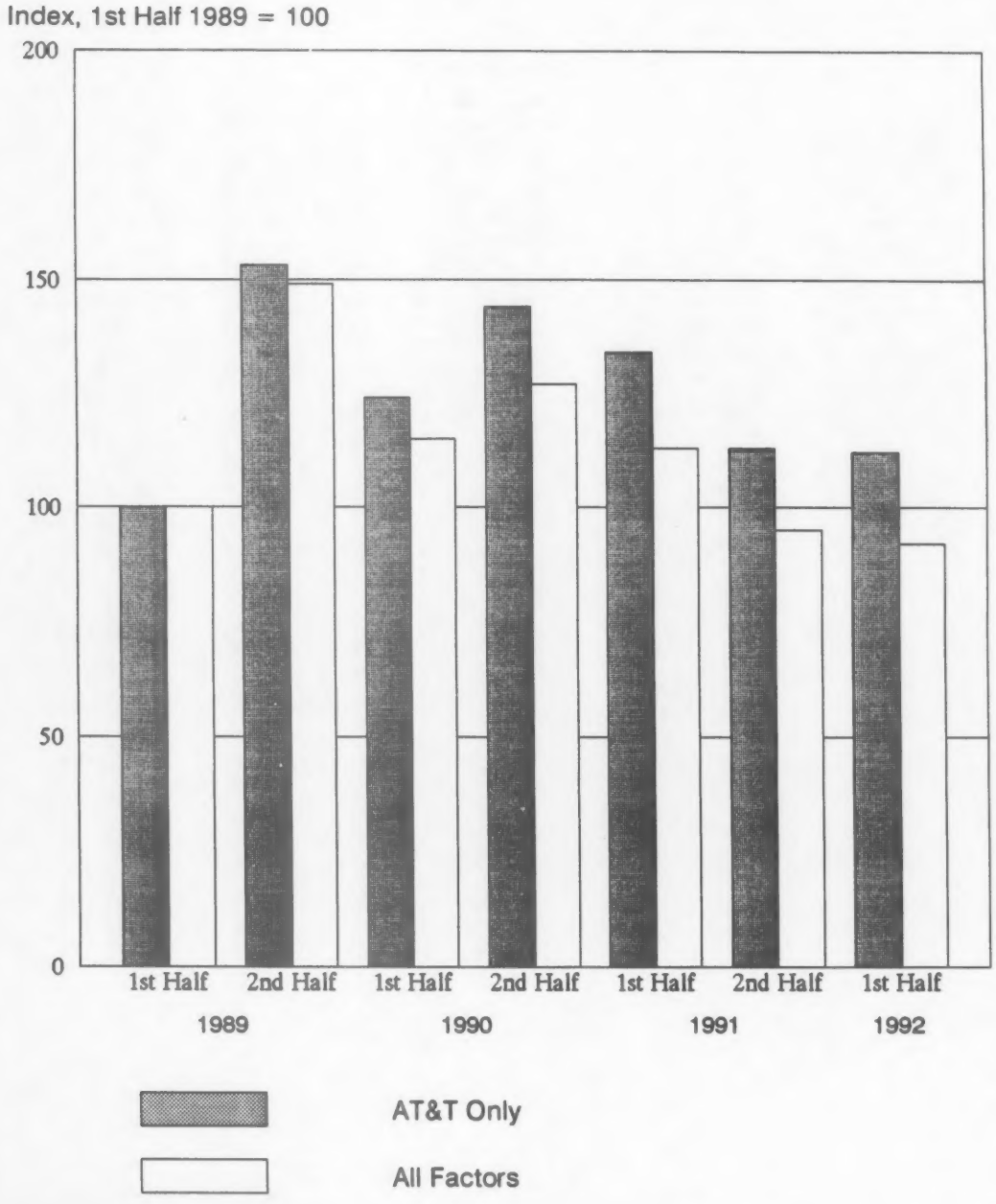
Source: FCC, Common Carrier Bureau, Domestic Facilities Division.

* Estimate.

Chart 6

AT&T's
Equipment Blockage and Failure Index

(1989–1992)

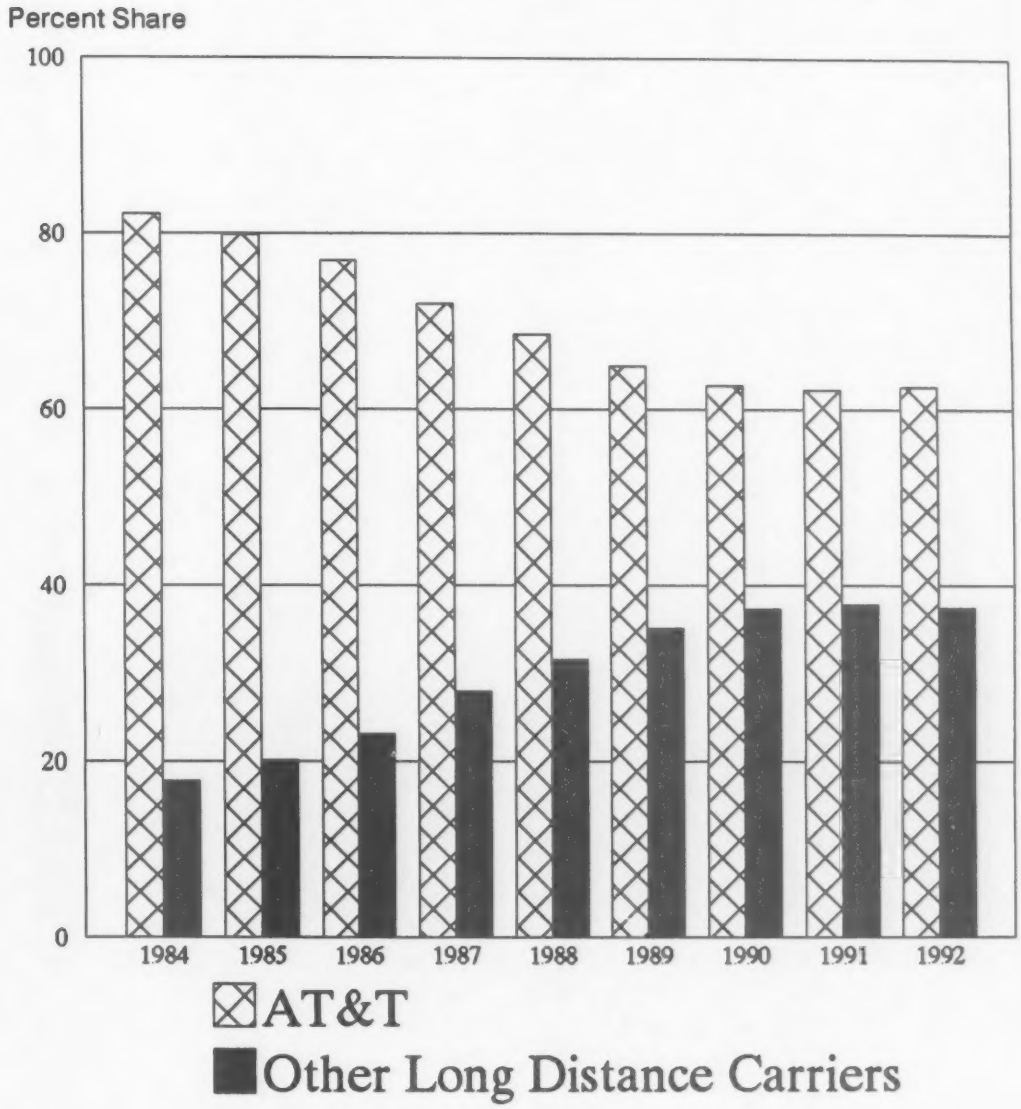


Source: FCC, Common Carrier Bureau, Industry Analysis Division.

Chart 7

AT&T's Market Share
Interstate Switched Minutes of Use

(1984 – 1992)*, **



Source: FCC, Common Carrier Bureau, Industry Analysis Division. Long Distance Market Shares, 4th Quarter 1991, Released 3/24/92.

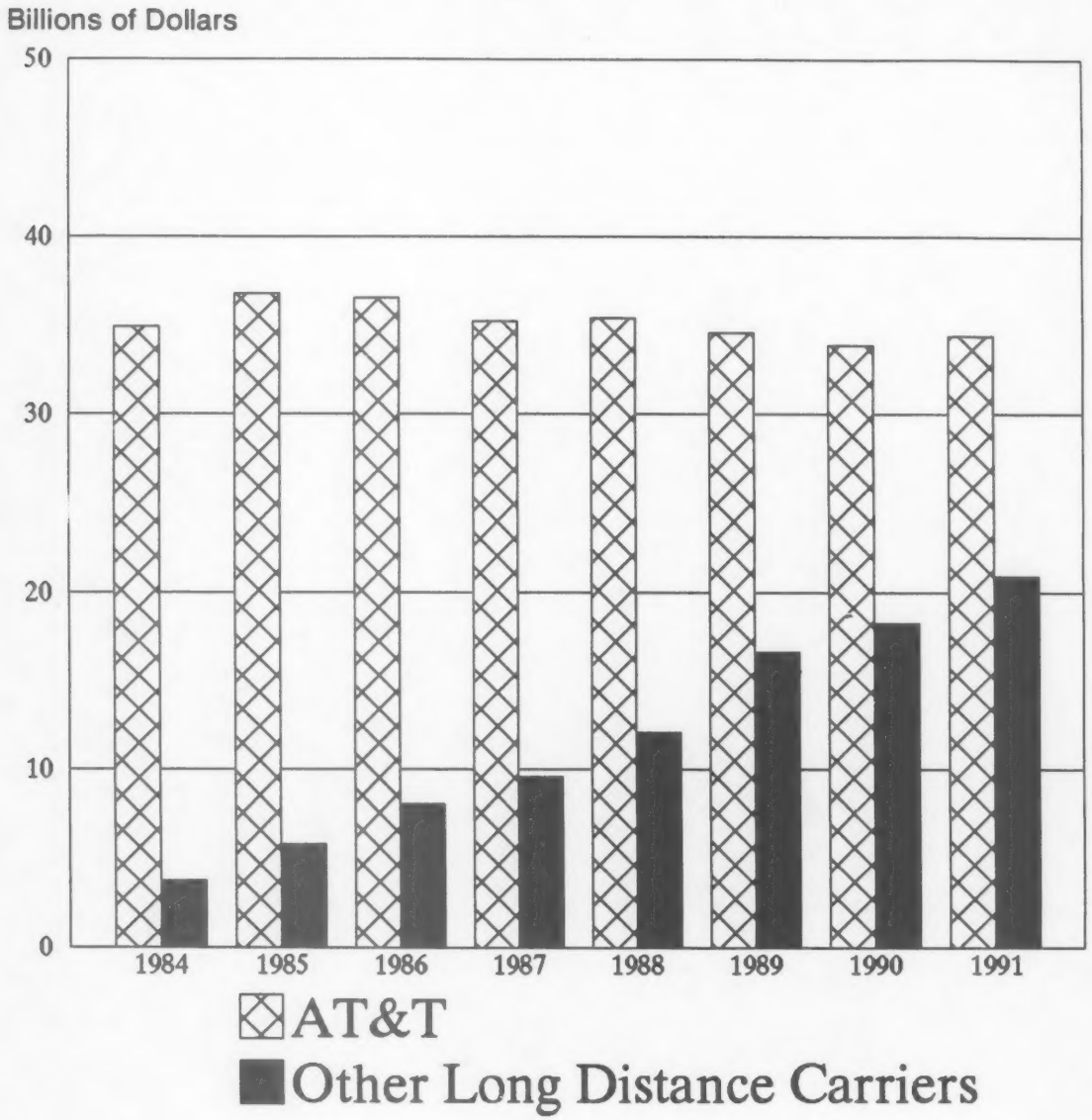
* Data for 1984 is based on the second half of the year. Data for first half 1984 was not availabl

** Data for 1992 is for the first quarter only. Later data is not yet available.

Chart 8

AT&T's Toll Revenues *
Compared with Other Long Distance Carriers

(1984–1991)



Source: FCC, Common Carrier Bureau, Industry Analysis Division.
* Includes intrastate and interstate revenues.

Chart 9

Number of Long Distance Telephone Carriers

Year	End of Quarter	Using Equal Access		Total All Carriers	
		Common Carriers *	Total **	Common Carriers *	Total **
1986	1	--	169	--	--
	2	--	183	--	--
	3	--	190	--	506
	4	--	210	--	533
1987	1	--	211	--	561
	2	--	213	--	n/a
	3	--	224	--	n/a
	4	--	239	--	540
1988	1	--	238	--	511
	2	--	248	--	519
	3	--	256	--	506
	4	--	266	--	510
1989	1	--	274	--	519
	2	--	287	--	n/a
	3	--	304	--	n/a
	4	--	318	--	514
1990	1	289	295	466	512
	2	288	294	460	506
	3	304	311	462	511
	4	304	311	448	499
1991	1	306	314	446	505
	2	327	342	441	542
	3	337	352	455	538
	4	351	366	473	576
1992	1	361	378	482	595

Source: FCC, Common Carrier Bureau, Industry Analysis Division. Summary of Long Distance Carriers, released June 16, 1992.

n/a: Data is not available.

* Separate data for common carriers was not available until 1990.

** Data includes firms not involved in common carriage.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 92-1195

THE OFFICE OF ENGINEERING AND TECHNOLOGY PRESENTS A TUTORIAL ON "THE NORTH AMERICAN DATUM"

Released Date: September 1, 1992

The Office of Engineering and Technology will present a tutorial on "The North American Datum" on September 15, 1992, at 1:30 P.M. in the Commission Meeting Room, Room 856, at 1919 M Street, N.W. The tutorial will be presented by David R. Doyle of the National Geodetic Survey; Dr. Muneendra Kumar of the Defense Mapping Agency; Richard Pearsall of the U.S. Geological Survey; and Richard V. Powell of the Federal Aviation Administration.

The FCC has become involved with the NAD 83 geographical coordinate system through the coordination of antenna locations with the Federal Aviation Administration (FAA). The FAA is implementing an act of Congress that requires their use of NAD 83 location information after October 15, 1992.

Eventually all site coordinates in the FCC's data bases will be converted to NAD 83 format. This tutorial will inform those in the communications community what is required, what tools are available to implement the new coordinate datum system, and what the individual antenna owner/operator should do to meet these requirements.

Messrs. Doyle and Kumar will address the various facets of the North American Datum of 1983 (NAD 83) and the World Geodetic System of 1984 (WGS 84) — methods of accurately describing any point on the surface of the Earth. Messrs. Doyle and Kumar will also discuss datum transformation and distance/bearing software that their respective agencies have developed. Mr. Pearsall will discuss the history of NAD 83, software and graphic tools that USGS is developing to make the public transition to NAD 83 efficient. Mr. Powell will discuss why the FAA needs to make the change to NAD 83; how and when FAA's data bases will be converted to NAD 83; changes in FAA FORM 7460-1 for submitting coordinate (latitude/longitude) data; conversion of the various FAA/NOAA aeronautical products (*i.e.*, maps, charts and data bases) to NAD 83; and changes in the FAA processing procedures.

WGS 84 is a generalized model for the world while NAD 83 is tailored to better describe North America. NAD 83 is a more accurate description of the earth's surface than the system presently in use, the North American Datum of 1927 (NAD 27). Both the WGS 84 and NAD 83 models have been developed using the more accurate measuring systems available through satellites, lasers and computers.

For additional information on this tutorial contact: Eugene Cea, OET, ☎ +1 (202) 653-8151, or Jack Linthicum, OET, ☎ +1 (202) 653-8160.

— FCC —

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 92-1188

THE FEDERAL COMMUNICATIONS COMMISSION CONTINUES TO REQUIRE APPLICANTS TO USE COORDINATES BASED ON THE NORTH AMERICAN DATUM OF 1927

Released Date: September 1, 1992

This public notice is intended to provide a background for eventual changes in Commission rules and procedures needed for a planned transition to specifying geographical coordinates (latitudes/longitudes) in terms of the North American Datum of 1983 (NAD 83). This change will in the future affect all Commission licensees and is a result of the Federal Aviation Administration's (FAA) impending conversion to NAD 83 on October 15, 1992.

BACKGROUND

In the field of telecommunications it is essential that the latitude and longitude of antennas and towers be known to a high degree of accuracy. Those coordinates are used to determine spacings between stations, determine antenna height above average terrain, assess potential impact of structures on air safety, allow efficient frequency reuse, and evaluate environmental effects, among other things. The proper specification of latitude and longitude is an integral part of the Commission's regulations; errors and inconsistencies could have technical and legal consequences.

Until recently the determination of position in the continental United States was based on various geodetic reference systems that had been established over the past 70 years. The method for determining coordinates used in filing FCC station applications were based on these various geodetic reference systems as show on the attached Table, "Local Horizontal Datums of the United States of America". Improvements in technology, particularly in satellite surveying and photography, have resulted in a small but noticeable shift in the geodetic reference system which, in turn, will alter the coordinates (latitude and longitude) of towers and antennas.

The Earth is not a perfect sphere, but rather, being somewhat flattened in the polar regions, an ellipsoid. Until the early 1980s, the latitudes and longitudes of places in North America were based on a model of the earth's shape formulated in 1866 and known as the Clarke ellipsoid. Surveys made to determine the coordinates of a given point were referenced to a triangulation station in the conterminous United States known as MEADES RANCH. Eventually as more observations were added to the network of the U.S. Coast and Geodetic Survey, they were incorporated into a system which became codified as the North American Datum of 1927 (NAD 27).

The 25,000 survey points in the 1920's expanded to 250,000 in the 1970's, many of which were 'forced' to fit the NAD 27 network. That led to a loss of accuracy. Accordingly, the National Academy of Sciences recommended that the North American Datum be re-adjusted. Using the latest technology, scientists updated their depiction of the shape of the earth and the location of physical features on it. That finally lead to a more accurate and consistent reference system for North America, known as the North American Datum of 1983 (NAD 83), based on the Geodetic Reference System of 1980 (GRS 80) ellipsoid. This new system was adopted as the official horizontal coordinate system of the United States by notice in the *Federal Register*, June 14, 1989.

IMPACT

One of the benefits of using more accurate position data is enhanced safety afforded the aviation industry. Consequently, Congress passed Public Law 101-508, Section 9120, the *Aviation Safety and Capacity Expansion Act of 1990*, which mandated that the FAA convert all position data used in the National Airspace System to NAD 83. In compliance with this law, the FAA, on May 11, 1992, issued a **Notice** in the *Federal Register* advising that they will convert all latitude and longitude coordinates used in the National Airspace System to NAD 83 on October 15, 1992. This will directly affect coordination between the FAA and FCC on all matters related to tower and antenna and aviation facility locations.

The FCC will eventually be required to use NAD 83 coordinates in all of its activities, including licensing and the maintenance of data bases. However, before this can be implemented, studies must be carried out to determine how best to accomplish the conversion with the resources available and at a minimum impact to the public, while also analyzing how best to resolve issues as:

- changes to application forms
- issuance of adjusted licenses to existing licensees
- changes to rules and regulations
- minimizing the public burden and confusion
- changes to formulae such as those for computing distance between two points
- international interchange of coordination data with Canada and Mexico, *etc.*

INTERIM PROCEDURE

The FCC will assign the first priority to internally converting those software systems and data bases affected by the FAA changeover to NAD 83. **However, in order to provide sufficient time to study the changes and issues discussed above and to assure continuity of operations, the Commission will require applicants to continue to provide position information in NAD 27 coordinates or, for certain specialized areas in accordance with the attached Table of local horizontal datums.** We realize there could be some confusion to applicants, consulting engineers and frequency coordinators for filing applications. Applicants and those preparing applications must be aware of the necessity of providing coordinates in accordance with the attached Table of local horizontal datums UNTIL FURTHER NOTICE. We will issue further guidance later as experience is gained with problem areas.

TUTORIAL

The Commission has arranged for a tutorial, open to the public, to be presented on September 15, 1992, at 1:30 pm in the Commission Meeting Room, on conversion to NAD 83. At that time, a group of experts will expand on the background information presented above, and answer queries. A public notice will be issued announcing the tutorial. If necessary, the Commission will issue additional public notices and other documents on the subject of NAD 83 to clarify areas of concern or new developments.

For additional information, contact: Donald Draper Campbell, OET, telefax +1 (202) 653-8773, or ☎ +1 (202) 653-8113.

Local Horizontal Datums of the United States of America

Geographic Location	Horizontal Datum
Conterminous United States	North American Datum of 1927 (NAD 27) (1USGS, 1:24,000)
Alaska (except St. George Island, St. Paul Island and St. Lawrence Island)	North American Datum of 1927 (NAD 27) (USGS, 1:24,000, 1:25:000, 1:63,360 & 1:250,000)
Hawaii	Old Hawaiian (USGS, 1:24,000 & 1:62,500)
Puerto Rico (Commonwealth of)	Puerto Rico (USGS, 1:20,000)
United States Virgin Islands (unincorporated territory of)	Puerto Rico (USGS, 1:24,000)
Navassa Island, Quita Sueno Bank, Roncador Bank, Serrana Bank and Serranilla Bank	"Local astronomical datum" (No USGS map coverage) (NOAA No. 26194 *Navassa Is.*, 1:15,000)
St. George Island, AK	St. George (USGS, 1:250,000)
St. Paul Island, AK	St. Paul (USGS, 1:250,000)
St. Lawrence Island, AK	St. Lawrence (USGS, 1:250,000)
Midway Island	Midway Astro 1961 (No USGS map coverage) (NOAA No. 19481 *Midway Island*, 1:32,500)
Johnston Island	Johnston Island 1961 (No USGS map coverage) (NOAA No. 540 *Hawaiian Archipelago*, 1:3,121,170)
Northern Mariana Islands (Commonwealth of the)	
Saipan, Tinian and Rota	Guam 1963 (USGS, 1:24,000)
Other islands	"Local astronomical datum" (Not individually mapped by USGS)
American Samoa (unincorporated territory of)	American Samoa 1962 (USGS, 1:24,000)
Guam (unincorporated territory of)	Guam 1963 (USGS, 1:24,000)
Baker Island	"Local astronomical datum" (No USGS map coverage) (NOAA No. 83116 *Islands in the Pacific Ocean - Jarvis, Baker and Howland Islands*, 1:15,000)
Howland Island	"Local astronomical datum" (No USGS map coverage) (NOAA No. 83116 *Islands in the Pacific Ocean - Jarvis, Baker and Howland Islands*, 1:15,000)
Jarvis Island	"Local astronomical datum" (No USGS map coverage) (NOAA No. 83116 *Islands in the Pacific Ocean - Jarvis, Baker and Howland Islands*, 1:15,000)
Kingman Reef	"Local astronomical datum" (No USGS map coverage)
Palmyra Island	"Local astronomical datum" (No USGS map coverage) (NOAA No. 83157 *Palmyra Atoll and approaches to Palmyra Island*, 1:10,000)
Wake Island	Wake Island 1952 (No USGS map coverage) (NOAA No. 81664 *Wake Island*, 1:15,000)

— FCC —

Before the
Federal Communications Commission
Washington, D.C. 20554

ET Docket No. 92-9

In the Matter of

Redevelopment of Spectrum to	RM-7981
Encourage Innovation in the	RM-8004
Use of New Telecommunications Technologies	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: August 5, 1992; Released: September 4, 1992

Comment Date: December 4, 1992
Reply Comment Date: January 6, 1993

By the Commission:

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INTRODUCTION

1. The Commission herein proposes to reallocate five bands above 3 GHz to private and common carrier fixed microwave use on a co-primary basis and to prescribe additional technical standards to govern use of these bands. These proposals respond to petitions for rule making filed by the Utilities Telecommunications Council (UTC) (RM-7981) and Alcatel Network Systems, Inc. (Alcatel) (RM-8004).

2. This action bolsters the Commission's commitment that the quality and availability of service provided by the licensees now operating in the 2 GHz band not be reduced. We recognize the importance of these services, and intend to take any steps necessary to prevent disruptions to them. Today's proposals are intended to ensure that alternative frequencies will be available to 2 GHz licensees that are suitable for providing equivalent service with comparable reliability.

BACKGROUND

3. The *Notice of Proposed Rule Making* (*Notice*) in this proceeding proposed to reallocate to emerging telecommunications technologies 220 MHz of the 1.85-2.20 GHz (2 GHz) band.[1] Specifically, the *Notice* proposed that the 1.85-1.99, 2.13-2.15, and 2.18-2.20 GHz bands now allocated to the Private Operational-Fixed Microwave Service (Part 94) and the 2.11-2.13 and 2.16-2.18 GHz bands now allocated to the common carrier Domestic Public Fixed Radio Services (Part 21) and Public Mobile Service (Part 22)[2] be reallocated.

4. In the *Notice*, the Commission recognized that the private and common carrier licensees operating in the 2 GHz band provide important and essential services. We emphasized, therefore, that any reallocation should prevent disruption to these services. We also stated that it appears to be technically feasible to relocate 2 GHz licensees to alternative media or to higher frequency fixed microwave bands. We observed that a technical study by our staff indicates that the existing higher frequency fixed service bands appear to offer adequate capacity for reaccommodating the existing 2 GHz operations and can support the path lengths of those operations. We therefore proposed to make the 3.7-4.2, 5.925-6.425, 6.525-6.875, 10.7-11.7, 11.7-12.2, 12.7-13.25, and 17.7-19.7 GHz bands available to existing 2 GHz licensees for relocation, and to apply the technical rules and coordination procedures for each of these bands to the relocated operations.[3] To provide for this reaccommodation of 2 GHz licensees, we proposed a "blanket" waiver of the eligibility requirements in these bands.

5. Comment was solicited on a number of options for easing the transition, ranging from allowing negotiations between existing users and those developing new services with no fixed time for mandatory relocation, to altering the 2 GHz fixed service allocation to secondary status at the end of the normal equipment life expectancy of 10 or 15 years. We proposed to permit significant flexibility in

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[1] *Notice of Proposed Rule Making*, ET Docket No. 92-9, 7 FCC Rcd 1542 (1992).

[2] Part 22 use is limited to fixed control and repeater stations functioning in conjunction with the Public Land Mobile Service.

[3] We also invited comment on the feasibility of making available to 2 GHz fixed users a portion of the 1.71-1.85 GHz government band. Subsequently, we solicited public comment on the NTIA report entitled "Federal Spectrum Usage of the 1710-1850 and 2200-2290 MHz Bands;" *see Public Notice*, Mimeo No. 22951, released May 4, 1992.

negotiations, allowing parties to negotiate financial arrangements to encourage reaccommodation and to underwrite the costs of transition for the existing users and earlier access by the new users. Finally, we stated that during the pendency of this rulemaking we would continue to grant applications for 2 GHz fixed operations, but that applications for new facilities would be granted only on a secondary basis, pending the outcome of this proceeding.[4]

6. *UTC Petition.* In its petition, UTC -- the national representative on communications matters for electric, gas, water, and steam utilities -- contends that the Commission must adopt specific technical rules to accommodate in other bands the 2 GHz private and common carrier fixed stations potentially affected by the proposals contained in the *Notice* and to provide spectrum for new private microwave systems. UTC proposes that we commence a separate rule making to make available for private fixed microwave use the 1.71-1.85 GHz band allocated for government fixed and mobile use, the 3.7-4.2 GHz (4 GHz) and 5.925-6.425 GHz (6 GHz) bands allocated for Part 21 and Part 25 (satellite communications) uses, and the 10.7-11.7 GHz (11 GHz) band allocated for Part 21 use. UTC also urges the Commission to adopt appropriate channeling plans and technical standards to ensure that these bands can accommodate the needs of private microwave users.

7. UTC maintains that neither the 4 or 6 GHz common carrier nor the 6.525-6.875 GHz (6 GHz) private bands are suitable as presently configured for most private microwave systems due to incompatible channelization. By way of example, UTC states that most channels in the 6 GHz private band are 5 or 10 MHz wide and that the remaining narrower channels can accommodate only about one-fourth of the 13,000 stations that currently use the narrow 2 GHz channels. Also, UTC asserts that, with respect to the 4 and 6 GHz common carrier bands, loading requirements would disqualify most private microwave systems from relocating. Further, according to UTC, the number of satellite earth stations in the 4 GHz band impairs reaccommodation of 2 GHz fixed users. UTC therefore recommends several changes to the existing rules governing use of the 4 and 6 GHz common carrier bands, that the 11 GHz common carrier band be made available to Part 94 users, and that the Commission negotiate with the National Telecommunications and Information Administration (NTIA) to permit use of the 1.71-1.85 GHz government band for non-government use.

8. *Alcatel Petition.* In its petition, Alcatel -- a subsidiary of Alcatel Alsthom, the world's largest manufacturer and supplier of telecommunications equipment -- states that the Commission should not require fixed microwave users to vacate the 2 GHz band until it adopts specific rules to allow the 2 GHz services to operate in other bands. In particular, Alcatel expresses concern about 2 GHz low and medium capacity fixed systems being relocated to primarily high capacity bands above 3 GHz. Alcatel asserts that merely allowing low capacity 2 GHz users to migrate to the higher frequency bands without certain rule changes would be inefficient. While it prefers maintenance of the *status quo* at 2 GHz, Alcatel recognizes that Personal Communications Services (PCS) and other emerging technologies are in the public interest and require spectrum. However, Alcatel asserts that fiber optics, satellite, and cable media are not viable alternatives for fixed microwave users. It argues that cost considerations preclude the use of each and that, in addition, fiber optics suffers from reliability problems, satellite bandwidth is not readily available, and cable has inherently low capacity. Accordingly, Alcatel proposes the 4, 6, and 11 GHz reallocations proposed by UTC and also proposes that the shared government/non-government 3.6-3.7 GHz, the 6 GHz private, and the 10.565-10.615/10.630-10.680 GHz (10 GHz) private and common carrier point-to-multipoint bands be reallocated to permit co-primary private and common carrier fixed microwave use. Alcatel states that its proposed reallocations would result in private users having access to an additional 2120 MHz[5] of spectrum and common carriers having access to an additional 510 MHz. Alcatel further proposes a detailed channelization plan for the reallocated bands and major amendments to several technical rules.

DISCUSSION

9. Commenting parties generally support the basic thrust of the UTC and Alcatel petitions, but express reservations about certain aspects of each. Parties representing common carriers appear to be more concerned about the proposals than parties representing private users. Issues raised in the petitions are addressed individually below.

10. *Reallocation and Channelization Plan.* UTC and Alcatel make the following specific proposals with respect to each band proposed for reallocation:

1) 1.71-1.85 GHz -- Negotiations with NTIA to permit shared government and non-government use (UTC).

2) 3.6-3.7 GHz -- Reallocation to private and common carrier fixed use on a co-primary basis with existing government and non-government aeronautical radionavigation, radiolocation, and fixed satellite services; channelization into an overlapping[6] twenty four 400 kHz pairs, twelve 800 kHz pairs, thirty 1.6 MHz pairs, eight 5 MHz pairs, and four 10 MHz pairs (Alcatel).

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[4] On May 14, 1992, we issued a *Public Notice* stating that this conditional secondary status will not be applied to most major modifications to existing 2 GHz construction authorizations or licenses, since most such modifications will not significantly affect the use and availability of existing 2 GHz spectrum; *see Public Notice*, Mimeo No. 23115.

[5] Alcatel calculates the amount of spectrum currently available to private fixed users as 460 MHz. However, this calculation omits 100 MHz of the 180 MHz of spectrum currently available in the 1850-1990, 2130-2150, and 2180-2200 MHz bands. Thus, while Alcatel's plan provides a total of 2580 MHz to private fixed users, the additional amount is actually 2020 MHz, rather than 2120 MHz.

[6] In an overlapping channelization plan, channels of different bandwidth share spectrum; *e.g.*, in Alcatel's 3.6-3.7 GHz channelization plan, the first 400 kHz channel uses the 3640.0175-3640.4175 MHz band, the first 800 kHz channel uses the 3640.025-3640.825 MHz band, and the twenty-fifth 1.6 MHz channel uses the 3640.04-3641.64 MHz band. Since these three channels share the 3640.04-3640.4175 MHz band, only one of the three can be assigned in a given area (absent time sharing). The advantage of an overlapping channelization plan is that it permits different numbers of channels of a given bandwidth to be assigned in different geographic areas, depending upon need.

3) 4 GHz -- Reallocation to private fixed use on a co-primary basis with existing common carrier fixed and satellite communications services; designation of at least 80 MHz of this spectrum for primary use by fixed users only (UTC and Alcatel); rechannelization from twelve 20 MHz channel pairs to 1.6, 5, and 10 MHz channels (UTC); rechannelization to an overlapping twenty-four 400 kHz pairs, twelve 800 kHz pairs, twenty-four 1.6 MHz pairs, twelve 3.2 MHz pairs, six 5 MHz pairs, twenty-five 10 MHz pairs, and twelve 20 MHz pairs (Alcatel).

4) 6 GHz (common carrier) -- Reallocation to private fixed use on a co-primary basis with existing common carrier fixed and satellite communications services (UTC and Alcatel); rechannelization from eight 29.65 MHz channel pairs to 1.6, 5, and 10 MHz channels (UTC); rechannelization to an overlapping twenty-four 400 kHz pairs, twelve 800 kHz pairs, forty-two 1.6 MHz pairs, twenty 3.2 MHz pairs, twelve 5 MHz pairs, twenty-four 10 MHz pairs, and eight 30 MHz pairs (Alcatel).

5) 6 GHz (private) -- Reallocation to common carrier fixed use on a co-primary basis with the existing private fixed service; rechannelization from an overlapping five 800 kHz pairs, three 1.6 MHz pairs, fifteen 5 MHz pairs, and sixteen 10 MHz pairs to an overlapping twelve 400 kHz pairs, six 800 kHz pairs, forty-five 1.6 MHz pairs, fifteen 5 MHz pairs, and sixteen 10 MHz pairs (Alcatel).

6) 10 GHz -- Reallocation from private and common carrier point-to-multipoint (Digital Termination Service (DTS) and Digital Electronic Message Service (DEMS), respectively) use to private and common carrier point-to-point fixed use on a co-primary basis; channelization into an overlapping twenty-four 400 kHz pairs, twelve 800 kHz pairs, thirty 1.6 MHz pairs, twenty 2.5 MHz pairs, and eight 5 MHz pairs (Alcatel).

7) 11 GHz -- Reallocation to private microwave use on a co-primary basis with the existing common carrier fixed service (UTC and Alcatel); rechannelization from twelve 40 MHz pairs to an overlapping fifty 10 MHz pairs and sixteen 30 MHz pairs (Alcatel).

11. UTC and Alcatel contend that the above plans are consistent with changes in the microwave communications industry. Alcatel states that while common carriers have made extensive use of long haul systems using full blocks of 4 and 6 GHz frequencies, with the proliferation of fiber optic systems few new multichannel systems are being built. Also, according to Alcatel, common carriers increasingly need low capacity systems to extend digital loop carrier systems over rough terrain and to connect remote cell sites in cellular Rural Service Areas, while private operators have new requirements for high capacity systems to carry high-speed local area network traffic and digitized video between buildings in private networks. Consequently, Alcatel asserts, microwave operators are demanding flexible radio equipment that can be used for low or high capacities as service requirements change and the equipment needs of common carriers and private operators increasingly become similar. Therefore, Alcatel concludes, co-primary sharing of several bands is technically feasible.

12. Comsearch strongly supports a band sharing plan, contending that the distinction between private fixed users and common carriers should be eliminated for the purpose of band allocation. American Petroleum Institute and Microwave Radio Corporation state that Alcatel's proposals would help ensure that adequate spectrum remains available to private fixed microwave users. However, Harris Corporation - Farinon Division (Harris) argues that since the *Notice* proposed to reallocate 180 MHz of 2 GHz spectrum from private users versus only 40 MHz from common carriers, the 6 GHz private band should not be available for sharing by common carriers. Accordingly, it recommends that this band be excluded from the sharing plan or that, alternatively, private users be allowed to share Part 74 (broadcast auxiliary) spectrum.

13. The National Spectrum Managers Association maintains that the Commission should establish rules that will encourage 2 GHz fixed users to seek spectrum in bands that already have narrowband channelization plans. MCI Telecommunications Corporation (MCI) states that if the Commission intends to proceed with its proposed 2 GHz reallocation, it should revise its rules regarding channelization, bandwidth, and technical standards in higher fixed bands to provide for orderly and efficient use of the spectrum. However, MCI believes that these bands should be shared only between compatible bandwidths to ensure efficient spectrum utilization. Further, MCI argues that Alcatel's proposal aids private users at the expense of common carriers. MCI argues that common carriers currently have 2,070 MHz of spectrum available on an exclusive basis, which is superior to the 2,580 MHz of shared spectrum that they would have under Alcatel's proposal. In MCI's view, the common carrier 4, 6, and 11 GHz bands are already congested, so that permitting private use of them would lead to lack of spectrum availability.

14. Pacific Telesis Group (PacTel) states that private users should not be allowed access to the 6 and 11 GHz common carrier bands. PacTel contends that the 4 GHz band is essentially closed to terrestrial users due to potential interference to earth stations and that the 6 and 11 GHz bands are the only long haul, high capacity bands available to common carriers. In PacTel's view, Alcatel's assertion that multi-channel, high capacity radio routes are now seldom required is incorrect. PacTel says that its subsidiaries have both single channel and multi-channel requirements and that allowing the 6 and 11 GHz bands to be rechannelized and opened to private use would exacerbate the current shortage of high-capacity channels. Further, PacTel argues that Alcatel's proposal to sub-divide each 30 MHz channel in the 6 and 11 GHz bands into three 10 MHz channels for medium capacity use and to allow the medium capacity user to occupy the center frequency would be inefficient, because channel and polarization constraints likely would prevent the two adjacent channels from being used if needs of the medium capacity user do not increase. Moreover, PacTel asserts that some narrowband users may overstate their channel loading and apply for 10 MHz channels, thus leading to even greater inefficiency.

15. Communications Transmission, Inc. (CTI) opposes the Alcatel Petition, contending that it is premature and would balkanize the microwave spectrum. CTI states that Alcatel proposes rule changes to overcome relocation problems that a 2 GHz fixed user may never face. Also, CTI says that Alcatel's proposal to sub-channelize the spectrum would limit the ability of common carriers to expand

their capacity to meet customer needs and increase the risk of interference to existing microwave users. Further, in CTI's view, Alcatel's sharing proposal would result in a large number of comparative hearings to decide whether the use of spectrum in a certain location is more in the public interest for a common carrier or private applicant. CTI maintains that currently there exists a well-organized system of common carrier frequency coordination that would be severely disrupted by the co-mingling of private and common carrier users. Finally, CTI asserts that the existing data base would take many months, if not years, to update if private users are allowed access to common carrier bands.

16. Bonneville International Corporation, Capital Cities/ABC, Inc., CBS Inc., Communications Satellite Corporation (Comsat), GE American Communications, Inc. (GE Americom), GTE Service Corporation (GTE), Home Box Office (HBO), Hughes Communications Galaxy (Hughes), IDB Communications Group, Inc., National Public Radio, Inc., Pan American Satellite, and United Video, Inc. oppose UTC's and Alcatel's proposal to reallocate at least 80 MHz of fixed-satellite spectrum in the 4 GHz band from primary to secondary use. Comsat contends that fixed satellite users need this spectrum, and argues that satellite use across the 4 GHz band need not preclude terrestrial use, if coordination procedures are adequate. GE Americom says that reallocating 40 MHz on each side of this band from fixed satellite use, as proposed by Alcatel, would undermine the efficiency of high-technology satellites and antennas using this band, in which cable television programmers have invested millions of dollars. GE Americom argues that Alcatel's proposal would force these programmers to relocate to a higher band and forfeit this large investment. GTE states that the 4 GHz band already is very congested, and reallocating 80 MHz from fixed satellite use would severely restrict satellite and earth station operation at 4 GHz. Further, in GTE's view, reallocation would create uncertainties in the market regarding the reliability and stability of satellite-based technologies. HBO asserts that the Alcatel proposal would eliminate four full downlink transponders at 4 GHz, creating a detrimental impact on operators and users of 4 GHz satellites, especially with respect to television distribution. Hughes contends that Alcatel has failed to demonstrate that the needs of fixed microwave users cannot be met either by co-primary use of 4 GHz spectrum or by alternative media.

17. We find merit in many of the proposals made by UTC and Alcatel. We are sensitive to the needs of 2 GHz fixed users for channelization plans and technical standards that meet their specific requirements. In meeting these needs, however, we will not impose undue hardships on the existing users of the bands above 3 GHz. In general, we believe that the reallocation and channelization plan proposed by Alcatel for bands above 3 GHz balances the interests of both groups.

18. Specifically, we propose to adopt Alcatel's reallocation and channelization proposals, with the exceptions of the 3.6-3.7 GHz band proposal and the proposal (also made by UTC) that 80 MHz of spectrum in the 4 GHz band currently allocated to the Fixed-Satellite Service (FSS) on a primary basis be downgraded to secondary.[7] We believe that adoption of Alcatel's basic plan will treat both private users and common carriers equitably.[8] In this regard, we note that Harris focuses on the fact that in the *Notice* 180 MHz of spectrum is proposed to be reallocated from private fixed use versus only 40 MHz from common carrier fixed use, whereas MCI focuses on the fact that under Alcatel's proposals private users would gain access to far more spectrum than common carriers. Since more private users than common carriers are potentially affected by the proposals in the *Notice*, we believe this approach is appropriate.

19. We recognize that Alcatel's sharing proposal may not be ideal for either private users or common carriers, but believe that it is a viable compromise. We do not believe that opening Part 74 spectrum to private and common carrier fixed operators, as suggested by Harris, is desirable, due to incompatible technical standards. We disagree with CTI, MCI, and PacTel that co-primary sharing and rechannelizing the 4, 6, and 11 GHz common carrier bands is inequitable to common carriers. We believe that coordination among fixed microwave operations of the two services -- and coordination between these terrestrial users and satellite services -- can enable efficient sharing of these bands. Correspondingly, we believe that coordination among private users and common carriers in the 6 GHz private band can allay Harris' concerns about sharing of this band. We are confident that maximizing the amount of spectrum to be shared by the two classes of users will result in its most productive use. We also note that a sharing approach has been successful in other bands, such as the 928/952 MHz multiple address bands.[9] Contrary to CTI's arguments, we believe that both private and common carrier users will be accommodated through established frequency coordination procedures.

20. We do not believe that the 3.6-3.7 GHz band can accommodate additional non-government users at this time. While the band is allocated to the non-government FSS, such use is limited due to frequency coordination and electromagnetic compatibility constraints with government users. The predominant use is for government aeronautical radionavigation and military radiolocation services. Permitting fixed microwave use of this band would create the potential for interference to these important services. Accordingly, we are not proposing to allocate this band for fixed microwave use. However, we will approach NTIA and open formal discussions to determine whether some form of shared access to the 3.6-3.7 GHz band by fixed microwave users is feasible.

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[7] We also propose to allow the approximately 20 existing point-to-multipoint users of the 10 GHz band to remain on a grandfathered basis. We note that none of these users commented on Alcatel's proposed reallocation of this band to point-to-point use and that point-to-multipoint DTS and DEMS spectrum is available in the 18.82-19.26 GHz band; however, given our desire not to disadvantage any existing users and their relatively small numbers, we believe that grandfathering is desirable. We request comment on this approach.

[8] We believe that adopting the sharing plan proposed herein would render moot a petition for rule making (RM-6921) filed by CTI, requesting that Part 94 microwave licensees be permitted to share the point-to-point microwave bands allocated for Part 21 use. We request comment on whether the CTI Petition can be dismissed as moot if the sharing plan proposed herein is adopted.

[9] *See Second Report and Order*, SS Docket 79-18, 50 RR 2d 1267 (1982).

21. With respect to the 4 GHz band, we conclude that the requirements of the FSS outweigh the needs of fixed terrestrial users for an exclusive primary allocation of 80 MHz in this band. Given the large amount of spectrum we are proposing be made available to terrestrial fixed users in other bands above 3 GHz, we are not convinced that such an exclusive allocation is necessary. Moreover, the adverse impact of such a reallocation on satellite services would not be acceptable, as pointed out by several commenters. Therefore, we are proposing to make private fixed microwave use co-primary in this band, but are not proposing to downgrade the FSS to secondary in any portion of the band.

22. *Use of Government Spectrum.* UTC states that relocation of displaced 2 GHz microwave operations to the 1.71-1.85 GHz government band would cause the least disruption to non-government 2 GHz microwave users, since the propagation characteristics of the two bands are nearly identical. UTC requests that we defer action on reallocating any portion of the 2 GHz band until negotiations with NTIA for use of the 1.71-1.85 GHz band are completed. Centerior Energy Corporation and Ocom Corporation support using 1.71-1.85 GHz as a relocation band for 2 GHz users. MCI recommends that the Commission, in conjunction with NTIA, identify bands in the 3-11 GHz range currently used by non-classified government systems and consider making these bands available on a shared basis by fixed private and common carrier users. The Association of American Railroads (AAR) and Large Public Power Council (LPPC) maintain that proper deployment of federal spectrum can eliminate the need for forced migration of 2 GHz fixed users.

23. NTIA has recently undertaken several studies of government spectrum use. In March, it issued a report entitled "Federal Spectrum Usage of the 1710-1850 and 2200-2290 MHz Bands," which was placed into the record in this proceeding and comment thereon solicited.[10] In a letter to Chairman Sikes, acting NTIA Administrator Thomas Sugrue stated that: "In coordination with affected government agencies, NTIA will continue working with the Commission to consider ways to meet the valid needs of commercial operators currently using the frequencies at issue. NTIA will also continue reviewing the federal government use of the spectrum under NTIA's jurisdiction.[11] In testimony before the Senate Communications Subcommittee on June 3, 1992, Mr. Sugrue also stated that some spectrum in the 1.71-1.85 GHz band might be available for certain long microwave paths that could not be accommodated higher in the spectrum. Mr. Sugrue noted that NTIA is expected to issue a report shortly identifying portions of this band that might be used to accommodate these long microwave paths.

24. We believe that the proposals presented herein will meet the needs of 2 GHz fixed microwave users. We therefore are not delaying this proceeding pending negotiations with NTIA for access by non-government licensees to the 1.71-1.85 GHz government band. We continue discussions with NTIA on this issue, however, and will make appropriate modifications when we issue our final decision, should the situation change.

25. *Coordination Procedures and Technical Standards.* Alcatel recommends that the Part 21 coordination standards be applied to all bands proposed for reallocation. It further proposes: 1) dropping voice channel loading requirements and analog performance standards and substituting minimum digital system loading requirements; 2) that the current minimum path length requirements set forth in Section 21.710 of our rules be made flexible, so that path lengths shorter than the minimums would be permitted if the equivalent isotropic radiated power (EIRP) did not exceed a specified value or if an appropriate technical showing were made; 3) that Part 21 and Part 94 antenna characteristics be updated and made consistent in all bands; 4) that power limitations be updated to include the proposed new private bands; 5) that Part 94 emission and bandwidth limitations be updated to conform to the proposed channelizations; 6) that frequency diversity transmissions,[12] currently restricted under Part 21, also be restricted under Part 94; and 7) that automatic transmit power control (ATPC) be permitted under Part 94.

26. UTC and Harris recommend that the Commission convene an industry committee to develop new technical requirements and interference criteria for the 4, 6, and 11 GHz common carrier bands. In UTC's view, our proposal to waive eligibility requirements for private access to common carrier bands does not address the issue of interference standards between common carrier and private systems. UTC asserts that the current common carrier interference standards are not as stringent as private standards and would not adequately protect many public safety/public service microwave systems and, therefore, many private users of the 2 GHz band would suffer degraded service if relocated to common carrier bands. UTC also argues that common carrier coordination procedures should not be applied to private users. UTC contends that the current coordination rules for each microwave band should remain, *i.e.*, if a private user desires to use an existing common carrier band, it should be subject to Part 21 coordination procedures; and if a common carrier desires to use an existing private band, it should be subject to Part 94 coordination procedures.

27. Harris states that an industry committee should develop consensus on the issues raised by UTC and Alcatel, as well as on additional issues, before the Commission proceeds to rule making. Harris argues that changes to Parts 21 and 94 should adequately accommodate both private and common carrier fixed users and that an industry committee can best enable this. Harris also suggests incorporating all channelization plans into the rules to facilitate standard equipment design; permitting expansion of existing microwave systems above 3 GHz under current channelization plans without waiver; and formalizing the informal common carrier coordination process by which channels are reserved for future growth and thereby formalizing time limits for how long a growth channel may be reserved. Harris concurs with Alcatel that ATPC be incorporated into Part 94 of the rules, but says that additional rule changes may be necessary to implement it because, in its view, it is unclear that ATPC is permitted under Part 21. Finally, Harris argues that current power mask rules need to be updated to allow manufacturers to

[10] *See* note 3, *supra*.

[11] *See* letter of May 4, 1992 from Thomas J. Sugrue to Alfred C. Sikes.

[12] Frequency diversity transmissions refer to non-working channels that protect working channels from interference.

design more cost-effective equipment capable of providing longer and more reliable path lengths at higher frequencies without causing additional out-of-band interference. Harris says that an industry committee could update, among other rules, the power mask requirements.

28. The Telecommunications Industry Association Fixed Point to Point Communication Section (TIA) agrees with Alcatel's proposals to drop voice channel loading requirements and analog performance standards because fixed microwave users are rapidly converting to digital technology. UTC states that voice channel loading requirements -- whether analog or digital -- should be eliminated for private fixed operations in the 4, 6, and 11 GHz common carrier bands, but disagrees that analog standards are unnecessary, maintaining that Alcatel's proposals are biased toward digital technology, that the majority of existing 2 GHz operators use analog equipment, and therefore that the impact on use of analog equipment should be addressed by the Commission. Comsearch expresses concern that Alcatel is overlooking a significant number of analog users in the 4, 6, and 11 GHz common carrier bands. Harris says that it generally agrees with the minimum digital system performance requirements proposed by Alcatel, but believes that a phased approach to achieving spectral efficiency should be implemented. Digital Microwave Corporation (DMC) argues that the payload capacity requirement for channels of 1.6 MHz and below should not be increased from the present requirement of one bit per second per Hertz, because of cost considerations. According to DMC, increasing the requirement for these channels would increase the cost of narrow bandwidth equipment to such an extent that there would be little use of channels of 1.6 MHz or less bandwidth.

29. Regarding UTC's and Harris' proposal for an industry committee to address technical issues, we believe that such a committee can serve a highly useful function. However, contrary to Harris, we see no need to delay this proceeding pending the formation of such a committee. Rather, we believe that our technical proposals set forth herein will assist such a committee with its deliberations. Further, we are not convinced that there is a need for the Commission to participate in such a committee at this time. Accordingly, we encourage fixed microwave users to form such a committee and will consider any comment they may have on the proposals herein within the comment period.

30. With respect to coordination procedures in the bands proposed for reallocation, we note that the basic difference in private and common carrier procedures is that in common carrier bands new users must notify potentially-affected licensees of their planned use, whereas there is no such requirement in private bands. We believe it would be least disruptive to existing users to maintain current procedures in each band, as proposed by UTC. Thus, in the 4, 6, 10, and 11 GHz common carrier bands, we propose that Part 21 coordination procedures be used, whereas in the 6 GHz private band, we propose that Part 94 procedures be used. For all of these bands, we solicit comment on whether frequency coordinators should establish time limits for the reservation of growth channels, such as a six month reservation period. We propose to use Part 21 interference standards in all bands except the 6 GHz private band, where Part 94 standards will apply. We note, however, that these standards are converging. While Section 94.63(b) of the Rules specifies stringent interference standards, Section 94.63(d) states that the use of standards developed by industry associations is acceptable. In practice, these associations are now developing similar, if not identical, standards for both private and common carrier fixed users. Despite the current differences in Part 21 and Part 94 interference standards, and the claim by UTC that inadequate protection is offered to private users who may need to relocate to the common carrier bands, we believe that many private uses can be accommodated in those bands without jeopardizing the quality of service.

31. We agree with Alcatel and TIA that digital equipment is increasingly being used in place of analog, and that new digital standards should be proposed in Parts 21 and 94. However, we also believe that existing voice channel loading requirements and analog performance standards should be maintained for the large number of analog users noted by UTC and Comsearch. Accordingly, we propose to adopt the digital standards recommended by Alcatel while proposing to maintain existing voice channel loading requirements and analog standards. We note Harris' concern that digital standards should be phased in and DMC's concern regarding the cost of narrow bandwidth equipment under Alcatel's proposed standards, and request comment on the validity of these concerns.

32. We concur with Harris that channelization plans should be incorporated into the rules to allow standard equipment design. Accordingly, we set forth in Sections 21.701 and 94.65 of our proposed rules the proposed channelization plans for the five bands under consideration herein. Further, we agree with Harris that expansion of existing microwave systems should be allowed under current channelization plans without waiver. Our goal is to permit new users to access the five bands without adversely affecting existing licensees.

33. Regarding ATPC, we concur with Alcatel that this technique is currently permitted under Part 21 of the rules, but disagree with both Alcatel and Harris that it is not permitted under Part 94. Section 94.45 states that effective radiated power may be changed without license modification provided that the change is no greater than 3 dB. However, to clarify this point, we propose to substitute the word "increase" for "change" in Section 94.45. We also propose to add language to Sections 21.710 and 94.79 that explicitly authorizes the use of ATPC. Finally, we solicit comment on Harris' proposal to update the power mask rules and Alcatel's proposals -- set forth in the rules appendix essentially as proposed by Alcatel -- for minimum path length requirements, antenna characteristics, frequency diversity transmissions, and power, emission, and bandwidth limitations.

34. *Suspension of Proceeding.* UTC proposes that we defer action on the emerging technology spectrum proposals in this proceeding pending consideration of its petition. Comments are mixed on UTC's proposal. American Personal Communications (APC), American Telephone and Telegraph, Inc. (AT&T), Motorola, Inc., SCS Mobilecom, Inc. (SCS), and Spatial Communications, Inc. (SCI) oppose it, contending that deferring action could delay the implementation of broadband PCS.[13]

[13] On July 16, 1992, the Commission proposed to allocate the 901-902, 930, 931, and 940-941 MHz bands for narrowband PCS

35. We believe it is unnecessary to defer action on the proposals made in the *Notice* in order to consider both UTC's and Alcatel's proposals. As APC, AT&T, Motorola, SCS, and SCI note, deferring action could delay the implementation of important new services, including PCS. Accordingly, we contemplate proceeding with final action on our emerging technology proposals and those herein in an expeditious manner, whether jointly or separately.

36. Our specific proposals for all rules sections proposed to be modified are contained in the rules appendix. We solicit comment on them.

PROCEDURAL MATTERS

37. *Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds as follows:

A. Reason for Action

This rule making proceeding is initiated to obtain comment regarding rules for relocating 2 GHz fixed microwave users to bands above 3 GHz.

B. Objective

The objective of this proposal is to reaccommodate current 2 GHz common carrier and private fixed microwave operators above 3 GHz with appropriate channelization plans and technical rules.

C. Legal Basis

The proposed action is authorized by Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r). These provisions authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio in the public interest.

D. Description, Potential Impact, and Number of Small Entities Affected

This proposal would provide for the reaccommodation above 3 GHz of 2 GHz private and common carrier fixed microwave operators, some of which are small entities. This proposal may provide new opportunities for radio manufacturers and suppliers of radio equipment, some of which may be small businesses, to develop and sell new equipment in the bands above 3 GHz. We invite specific comment by interested parties on the likely magnitude of the impact on small radio manufacturers and suppliers.

E. Reporting, Record Keeping, and Other Compliance Requirements

None.

F. Federal Rules That Overlap, Duplicate or Conflict With This Rule

None.

G. Significant Alternatives

If promulgated, this proposal will reaccommodate 2 GHz fixed microwave users in the most beneficial way to them and the broader public interest. We are unaware of other alternatives that would be as desirable. We solicit comments on this point.

38. *Other Matters.* This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, provide they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

39. This action is taken pursuant to Sections 4(i), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 303(c), 303(f), 303(g), and 303(r).

40. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 4, 1992, and reply comments on or before January 6, 1993. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

41. For further information concerning this rule making contact Rodney Small, (202) 653-8116, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A– PROPOSED RULE CHANGES

I. Part 2 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 2 - FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation in Part 2 continues to read:

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and the 1850-1895 and 1910-1975 MHz bands for broadband PCS. *See Notice of Proposed Rule Making and Tentative Decision*, GEN Docket No. 90-314 and ET Docket No. 92-100, FCC 92-333.

AUTHORITY: Sec. 4, 302, 303, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 154(i), 302, 303, 303(r), and 307, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations is amended as follows:

a. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 3700-4200 MHz band.

b. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 5925-6425 MHz band.

c. Add a primary allocation for the Domestic Public Fixed Services in column (6) of the 6525-6875 MHz band.

d. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 10.55-10.60 GHz band.

e. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 10.60-10.68 GHz band.

f. Add a primary allocation for the Private Operational-Fixed Microwave Service in column (6) of the 10.7-11.7 GHz band.

2.106 Table of Frequency Allocations

* * * * *

International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part(s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	*	*	*	*	*	
	3700-4200 FIXED. FIXED-SATELLITE (space-to-Earth). MOBILE except aeronautical mobile. 787		3700-4200	3700-4200 FIXED. FIXED-SATELLITE (space-to-Earth). NG41	DOMESTIC PUBLIC FIXED(21). SATELLITE COMMUNICATIONS (25). PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
	*	*	*	*	*	

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International Table			United States Table		FCC use designators	
Region 1 Allocation MHz	Region 2 Allocation MHz	Region 3 Allocation MHz	Government Allocation MHz	Non-Government Allocation MHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	*	*	*	*	*	
5925-7075			5925-7125	5925-6425		
	FIXED.			FIXED.	DOMESTIC PUBLIC FIXED(21).	
	FIXED-SATELLITE (Earth-to-space).			FIXED-SATELLITE (Earth-to-space).	SATELLITE COMMUNICATIONS(25).	
	MOBILE.				PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
	791 809		791 809	NG41		
				6425-6525		
				FIXED-SATELLITE (Earth-to-space).	AUXILIARY BROADCAST(74). CABLE TELEVISION(78).	
				MOBILE.	DOMESTIC PUBLIC FIXED(21).	
				791 809	PRIVATE OPERATIONAL FIXED MICROWAVE(94).	
				6525-6875		
				FIXED.	DOMESTIC PUBLIC FIXED(21).	
				FIXED-SATELLITE (Earth-to-space).	PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
				809		
	*	*	*	*	*	

International Table			United States Table		FCC use designators	
Region 1 Allocation GHz	Region 2 Allocation GHz	Region 3 Allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule Part (s)	Special-Use Frequencies
(1)	(2) *	(3) *	(4) *	(5) *	(6) *	(7)
10.55-10.60	FIXED. MOBILE except aeronautical mobile. Radiolocation.		10.55-10.60	10.55-10.60 FIXED.	DOMESTIC PUBLIC FIXED(21). PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
10.60-10.68	EARTH EXPLORATION SATELLITE (passive). FIXED. MOBILE except aeronautical RADIO ASTRONOMY. SPACE RESEARCH (passive). Radiolocation. 831 832		10.60-10.68 EARTH EXPLORATION-SATELLITE (passive). SPACE RESEARCH (passive). US265 US277	10.60-10.68 EARTH EXPLORATION-SATELLITE (passive). FIXED. SPACE RESEARCH (passive). US265 US277	DOMESTIC PUBLIC FIXED(21). PRIVATE OPERATIONAL FIXED MICROWAVE(94).	

International Table			United States Table		FCC use designators	
Region 1 Allocation GHz	Region 2 Allocation GHz	Region 3 Allocation GHz	Government Allocation GHz	Non-Government Allocation GHz	Rule Part (s)	Special-Use Frequencies
(1)	(2)	(3)	(4)	(5)	(6)	(7)
	*	*	*	*	*	
10.7-11.7 FIXED. FIXED-SATELLITE (space-to-Earth) (Earth-to-space). MOBILE except aeronautical mobile. 835	10.7-11.7 FIXED. FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile.		10.7-11.7	10.7-11.7 FIXED. FIXED SATELLITE (space-to-Earth).	DOMESTIC PUBLIC FIXED(21). PRIVATE OPERATIONAL-FIXED MICROWAVE(94).	
	*	*	*	*	*	

II. Part 21 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 21 - DOMESTIC PUBLIC FIXED RADIO SERVICES

1. The authority citation in Part 21 continues to read:

AUTHORITY: Secs. 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. as amended, 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

2. Subpart C is amended by revising sections 21.100, 21.108, and 21.122 to read as follows:

Section 21.100 Frequencies.

* * * * *

(c) Frequency diversity transmission will not be authorized in these services in the absence of a factual showing that the required communications cannot practically be achieved by other means. Where frequency diversity is deemed to be justified on a protection channel basis, it shall be limited to one protection channel for the bands 3,700-4,200 MHz, 5,925-6,425 MHz, and 6,525-6,875 MHz, and a ratio of one protection channel for three working channels for the bands 10,550-10,630 MHz and 10,700-11,700 MHz. In the bands 3,700-4,200 MHz, 5,925-6,425 MHz, and 6,525-6,875 MHz, no frequency diversity protection channel will be authorized unless there is a minimum of three working channels, except that where a substantial showing is made that a total of three working channels will be required within three years, a protection channel may be authorized simultaneously with the first working channel. A protection channel authorized under such exception will be subject to termination if applications for the third working channel are not filed within three years of the grant date of the applications for the first working channel. Where equipment employing digital modulation techniques with cross-polarized operation on the same frequency is used, the protection channel authorized under the above conditions may be considered to consist of both polarizations of the protection frequency where such is shown to be necessary.

* * * * *

Section 21.108 Directional antennas.

* * * * *

(c) * * *

Antenna Standards

Frequency (MHz)	Category	Maximum beam-width to 3 dB points (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
932.5 to 935	A	14.0	n/a		6	11	14	17	20	24
941.5 to 944	B	20.0	n/a			6	10	13	15	20
2,500 to 5,000	A	n/a	36	23	29	33	36	42	55	55
	B	n/a	36	20	24	28	32	32	32	32
5,000 to 10,550	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
10,550 to 10,680	A	3.4	34	20	24	28	32	35	55	55
	B	3.4	34	20	24	28	32	35	35	39
10,700 to 11,700	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
11,700 to 12,700	A	1.0	n/a	23	28	35	39	41	42	50
	B	2.0	n/a	20	25	28	30	32	37	47
17,700 to 18,820	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
18,920 to 19,700 1	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
21,200 to 23,600	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
31,000 to 31,300 2 3	n/a	4.0	38	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Above 31,300	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36

(d) * * *

(e) These limitations are necessary to minimize the probability of harmful interference to reception in the bands 5925-6875 on board geostationary space stations in the fixed-satellite service (Part 25).

(1) 5925 to 6875 MHz. * * *

(2) * * *

Section 21.122 Microwave digital modulation.

(a) Microwave transmitters employing digital modulation techniques and operating below 15 GHz shall, with appropriate multiplex equipment, comply with the following additional requirements:

(1) The bit rate, in bits per second, shall be equal to or greater than the bandwidth specified by the emission designator in Hertz (e.g., to be acceptable, equipment transmitting at a 20 Mb/s rate must not require a bandwidth of greater than 20 MHz), except the bandwidth used to calculate the minimum rate shall not include any authorized guard band.

(2) For digital modulation the following requirements must be met:

Nominal Channel Bandwidth (MHz)	Minimum Payload Capacity (Mbits/s)	Minimum Traffic Loading Payload (as percent of payload capacity)	Typical Utilization
0.400	1.54	n/a	1 DS-1
0.800	3.08	n/a	2 DS-1
1.60	6.17	n/a	4 DS-1
3.20	12.3	n/a	8 DS-1
5.00	18.5	n/a	12 DS-1
10.0	44.7	50	1 DS-3/STS-1
20.0	89.4	50	2 DS-3/STS-1
30.0	89.4	50	2 DS-3/STS-1

For all bands, concatenation of multiple contiguous channels is permitted as long as the minimum payload capacity requirements are met.

(3) The required minimum payload capacity shown in paragraph (a)(2) of this section may be reduced by a factor of 1/N provided that N transmitters may be operated satisfactorily within an authorized bandwidth less than, or equal to, the maximum authorizable bandwidth over the same radio path (e.g., the 89.4 Mb/s requirement for a 20 MHz maximum bandwidth may be reduced to 44.7 Mb/s if two transmitters can

be satisfactorily operated over the same path within the 20 MHz maximum bandwidth). Applications submitted for equipment type acceptance designed to operate in this mode must include data that will demonstrate successful operation under typical transmission conditions. Where type accepted equipment is designed to operate on the same frequency in a cross-polarized configuration to meet the above capacity requirements, the Commission will require, at the time additional transmitters are authorized, that both polarizations of a frequency be used before a new frequency assignment is made, unless a single transmitter installation was found to be justified by the Commission at the time it authorized the first transmitter.

* * * * *

3. Subpart G is amended by deleting section 21.507 and by revising sections 21.502, 21.503, and 21.506 to read as follows:

Section 21.502 Frequencies.

(a) Frequencies in the 17,700-19,700 MHz band are available for assignment for all DEMS applicants. Assignment will consist of a pair of channels as set out in paragraph (c) of this section plus internodal channels as set out in paragraph (d) of this section.

(b) Licensees may apply for an additional channel pair in an SMSA only when it is operating its previously authorized DTS at or near the expected capacity and the service to be provided will fully utilize all spectrum requested.

(c) Digital Termination Systems assignments shall be made according to the following plan:

Channel No.	Nodal station frequency band (MHz)	User station frequency band (MHz)
30	18,870-18,880	19,210-19,220
31	18,880-18,890	19,220-19,230
32	18,890-18,900	19,230-19,240
33	18,900-18,910	19,240-19,250
34	18,910-18,920	19,250-19,260

(d) Internodal link assignments are to be made in accordance with the provisions of Subpart I of Part 21, applying to point-to-point operations.

Section 21.503 Frequency stability.

The frequency stability of each Digital Termination Nodal Station transmitter authorized for this service shall be ±0.001%. The

frequency stability of each Digital Termination User Station transmitter authorized for this service shall be ±0.003%.

Section 21.506 Transmitter power.

The transmitter power will be governed by Section 21.107 of this rule part. Further, each application shall contain an analysis demonstrating compliance with Section 21.107(a).

4. Subpart I is amended by revising sections 21.701 and 21.710 to read as follows:

Section 21.701 Frequencies.

(a) Frequencies in the following bands are available for assignment to fixed radio stations in the Point-to-Point Microwave Radio Service.

932.5-935 MHz 17	13,200-13,250 MHz 4
941.5-944 MHz 17 18	17,700-18,820 MHz 5 10 15
2,110-2,130 MHz 1 3 7	18,920-19,160 MHz 5 10 15
2,160-2,180 MHz 1 2 5	19,260-19,700 MHz 5 10 15
3,700-4,200 MHz 8 19	21,200-22,000 MHz 4 11 12
5,925-6,425 MHz 19	22,000-23,600 MHz 4 11 12
6,525-6,875 MHz 20	27,500-29,500 MHz 5
10,550-10,630 MHz 20	31,000-31,300 MHz 16
10,700-11,700 MHz 8 9 20	38,600-40,000 MHz 4

Footnotes 1-18 * * *

19 Frequencies in this band are shared with stations in the fixed-satellite and private-operational fixed microwave services.

20 Frequencies in this band are shared with stations in the private-operational fixed microwave service.

(b) * * *

(c) * * *

(d) 3,700 to 4,200 MHz. 20 MHz maximum authorized bandwidth, 210 to 460 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3715.2175	4175.2175
3715.6325	4175.6325
3716.0475	4176.0475
3716.4625	4176.4625
3716.8775	4176.8775

3717.2925	4177.2925
3717.7075	4177.7075
3718.1225	4178.1225
3718.5375	4178.5375
3718.9525	4178.9525
3719.3675	4179.3675
3719.7825	4179.7825
3735.2175	4195.2175
3735.6325	4195.6325
3736.0475	4196.0475
3736.4625	4196.4625
3736.8775	4196.8775
3737.2925	4197.2925
3737.7075	4197.7075
3738.1225	4198.1225
3738.5375	4198.5375
3738.9525	4198.9525
3739.3675	4199.3675
3739.7825	4199.7825

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3715.425	4175.425
3716.255	4176.255
3717.085	4177.085
3717.915	4177.915
3718.745	4178.745
3719.575	4179.575
3735.425	4195.425
3736.255	4196.255
3737.085	4197.085
3737.915	4197.915
3738.745	4198.745
3739.575	4199.575

(3) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3700.84	4160.84
3702.50	4162.50
3704.16	4164.16
3705.84	4165.84
3707.50	4167.50

3709.16	4169.16
3710.84	4170.84
3712.50	4172.50
3714.16	4174.16
3715.84	4175.84
3717.50	4177.50
3719.16	4179.16
3720.84	4180.84
3722.50	4182.50
3724.16	4184.16
3725.84	4185.84
3727.50	4187.50
3729.16	4189.16
3730.84	4190.84
3732.50	4192.50
3734.16	4194.16
3735.84	4195.84
3737.50	4197.50
3739.16	4199.16

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3702.5	4162.5
3707.5	4167.5
3712.5	4172.5
3722.5	4182.5
3727.5	4187.5
3732.5	4192.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3705 1	4165 1
3715 1	4175 1
3725 1	4185 1
3735 1	4195 1
3745	3955
3755	3965
3765	3975
3775	3985
3785	3995
3795	4005
3805	4015

3815	4025
3825	4035
3835	4045
3845	4055
3855	4065
3865	4075
3875	4085
3885	4095
3895	4105
3905	4115
3915	4125
3925	4135
3935	4145
3945	4155

1 Alternate channels.

(6) 20 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3710 [1]	4170 [1]
3730 [1]	4190 [1]
3750	3970
3770	3990
3790	4010
3810	4030
3830	4050
3850	4070
3870	4090
3890	4110
3910	4130
3930	4150

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(e) 5,925 to 6,425 MHz. 30 MHz maximum authorized bandwidth, 250 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.2175	6175.2175
5925.6375	6175.6375
5926.0475	6176.0475
5926.4625	6176.4625
5926.8775	6176.8775
5927.2925	6177.2925
5927.7075	6177.7075
5928.1225	6178.1225
5928.5375	6178.5375
5928.9525	6178.9525
5929.3675	6179.3675
5929.7825	6179.7825
6170.2175	6420.2175
6170.6325	6420.6325
6171.0475	6421.0475
6171.4625	6421.4625
6171.8775	6421.8775
6172.2925	6422.2925
6172.7075	6422.7075
6173.1225	6423.1225
6173.5375	6423.5375
6173.9525	6423.9525
6174.3675	6424.3675
6174.7825	6424.7875

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.425	6175.425
5926.255	6176.255
5927.085	6177.085
5927.915	6177.915
5928.745	6178.745
5929.575	6179.575
6170.425	6420.425
6171.255	6421.255
6172.085	6422.085
6172.915	6422.915
6173.745	6423.745
6174.575	6424.575

(3) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.84	6175.84
5927.50	6177.50
5929.16	6179.16
6110.84	6360.84
6112.50	6362.50
6114.16	6364.16
6115.84	6365.84
6117.50	6367.50
6119.16	6369.16
6120.84	6370.84
6122.50	6372.50
6124.16	6374.16
6125.84	6375.84
6127.50	6377.50
6129.16	6379.16
6130.84	6380.84
6132.50	6382.50
6134.16	6384.16
6135.84	6385.84
6137.50	6387.50
6139.16	6389.16
6140.84	6390.84
6142.50	6392.50
6144.16	6394.16
6145.84	6395.84
6147.50	6397.50
6149.16	6399.16
6150.84	6400.84
6152.50	6402.50
6154.16	6404.16
6155.84	6405.84
6157.50	6407.50
6159.16	6409.16
6160.84	6410.84
6162.50	6412.50
6164.16	6414.16
6165.84	6415.84
6167.50	6417.50
6169.16	6419.16
6170.84	6420.84
6172.50	6422.50
6174.16	6424.16

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6112.5	6362.5
6117.5	6367.5
6122.5	6372.5
6127.5	6377.5
6132.5	6382.5
6137.5	6387.5
6142.5	6392.5
6147.5	6397.5
6152.5	6402.5
6157.5	6407.5
6162.5	6412.5
6167.5	6417.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5935	6185
5945	6195
5955	6205
5965	6215
5975	6225
5985	6235
5995	6245
6005	6255
6015	6265
6025	6275
6035	6285
6045	6295
6055	6305
6065	6315
6075	6325
6085	6335
6095	6345
6105	6355
6115 [1]	6365 [1]
6125 [1]	6375 [1]
6135 [1]	6385 [1]
6145 [1]	6395 [1]
6155 [1]	6405 [1]
6165 [1]	6415 [1]

[1] Alternate channels.

(6) 30 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5945	6195
5975	6225
6005	6255
6035	6285
6065	6315
6095	6345
6125 1	6375 1
6155 1	6405 1

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(f) 6,525 to 6,875 MHz. 10 MHz maximum authorized bandwidth, 160 to 345 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.2175	6870.2175
6525.6325	6870.6325
6526.0475	6871.0475
6526.4625	6871.4625
6526.8775	6871.8775
6527.2925	6872.2925
6527.7075	6872.7075
6528.1225	6873.1225
6528.5375	6873.5375
6528.9525	6873.9525
6529.3675	6874.3675
6529.7825	6874.7825

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.425	6870.425
6526.255	6871.255
6527.085	6872.085
6527.915	6872.915
6528.745	6873.745
6529.575	6874.575

(3) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6548.34	6728.34
6450.00	6730.00
6551.66	6731.66
6558.34	6738.34
6460.00	6740.00
6561.66	6741.66
6588.34	6748.34
6490.00	6750.00
6591.66	6751.66
6598.34	6758.34
6600.00	6760.00
6601.66	6761.66
6608.34	6768.34
6610.00	6770.00
6611.66	6771.66
6618.34	6778.34
6620.00	6780.00
6621.66	6781.66
6628.34	6788.34
6630.00	6790.00
6631.66	6791.66
6638.34	6798.34
6640.00	6800.00
6641.66	6801.66
6648.34	6808.34
6650.00	6810.00
6651.66	6811.66
6658.34	6818.34
6660.00	6820.00
6661.66	6821.66
6668.34	6828.34
6670.00	6830.00

6671.66	6831.66
6678.34	6838.34
6680.00	6840.00
6681.66	6841.66
6688.34	6848.34
6690.00	6850.00
6691.66	6851.66
6698.34	6858.34
6700.00	6860.00
6701.66	6861.66
6708.34	6868.34
6710.00	6870.00
6711.66	6871.66

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6550	6730
6560	6740
6590	6750
6600	6760
6610	6770
6620	6780
6630	6790
6640	6800
6650	6810
6660	6820
6670	6830
6680	6840
6690	6850
6700	6860
6710	6870 1

1 Use of this frequency is authorized on a non-interference basis to broadcast operations in the band 6875-7125 MHz.

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6545 1	6715 1
6555 1	6725 1
6565	6735
6585	6745
6595	6755

6605	6765
6615	6775
6625	6785
6635	6795
6645	6805
6655	6815
6665	6825
6675	6835
6685	6845
6695	6855
6705	6865
6535 2	6575 2

1 These frequencies may be assigned for unpaired use.
2 Available only for emergency restoration, maintenance bypass, or other temporary-fixed purposes. Such uses are authorized on a non-interference basis to other frequencies in this band. Interference analysis required by Section 94.63(a) does not apply to this frequency pair.

(g) 10,550 to 10,680 MHz. 5 MHz maximum authorized bandwidth, 65 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.2175	10670.2175
10605.6325	10670.6325
10606.0475	10671.0475
10606.4625	10671.4625
10606.8775	10671.8775
10607.2925	10672.2925
10607.7075	10672.7075
10608.1225	10673.1225
10608.5375	10673.5375
10608.9525	10673.9525
10609.3675	10674.3675
10609.7825	10674.7825
10610.2175	10675.2175
10610.6325	10675.6325
10611.0475	10676.0475
10611.4625	10676.4625
10611.8775	10676.8775
10612.2925	10677.2925
10612.7075	10677.7075
10613.1225	10678.1225
10613.5375	10678.5375
10613.9525	10678.9525

10614.3675	10679.3675
10614.7825	10679.7825

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.425	10670.425
10606.255	10671.255
10607.085	10672.085
10607.915	10672.915
10608.745	10673.745
10609.575	10674.575
10610.425	10675.425
10611.255	10676.255
10612.085	10677.085
10612.915	10677.915
10613.745	10678.745
10614.575	10679.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10560.625	10625.625
10561.875	10626.875
10563.125	10628.125
10564.375	10629.375

(4) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10565.84	10630.84
10567.50	10632.50
10569.16	10634.16
10570.84	10635.84
10572.50	10637.50
10574.16	10639.16
10575.84	10640.84
10577.50	10642.50
10579.16	10644.16
10580.84	10645.84

10582.50	10647.50
10584.16	10649.16
10585.84	10650.84
10587.50	10652.50
10589.16	10654.16
10590.84	10655.84
10592.50	10657.50
10594.16	10659.16
10595.84	10660.84
10597.50	10662.50
10599.16	10664.16
10600.84	10665.84
10602.50	10667.50
10604.16	10669.16
10605.84	10670.84
10607.50	10672.50
10609.16	10674.16
10610.84	10675.84
10612.50	10677.50
10614.16	10679.16

(5) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.25	10616.25
10553.75	10618.75
10556.25	10621.25
10558.75	10623.75
10561.25	10626.25
10563.75	10628.75
10566.25	10631.25
10568.75	10633.75
10571.25	10636.25
10573.75	10638.75
10576.25	10641.25
10578.75	10643.75
10581.25	10646.25
10583.75	10648.75
10586.25	10651.25
10588.75	10653.75
10591.25	10656.25
10593.75	10658.75
10596.25	10661.25
10598.75	10663.75
10601.25	10666.25
10603.75	10668.75
10606.25	10671.25
10608.75	10673.75

10611.25	10676.25
10613.75	10678.75

(6) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.875	10616.875
10555.625	10620.625
10559.375	10624.375
10563.125	10628.125

(7) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10567.5	10632.5
10572.5	10637.5
10577.5	10642.5
10582.5	10647.5
10587.5	10652.5
10592.5	10657.5
10597.5	10662.5
10602.5	10667.5

(h) 10,700 to 11,700 MHz. 30 MHz maximum authorized bandwidth, 500 MHz separation:

(1) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10705	11205
10715	11215
10725	11225
10735	11235
10745	11245
10755	11255
10765	11265
10775	11275
10785	11285
10795	11295
10805	11305
10815	11315

10825	11325
10835	11335
10845	11345
10855	11355
10865	11365
10875	11375
10885	11385
10895	11395
10905	11405
10915	11415
10925	11425
10935	11435
10945	11445
10955	11455
10965	11465
10975	11475
10985	11485
10995	11495
11005	11505
11015	11515
11025	11525
11035	11535
11045	11545
11055	11555
11065	11565
11075	11575
11085	11585
11095	11595
11105	11605
11115	11615
11125	11625
11135	11635
11145	11645
11155	11655
11165	11665
11175	11675
11185	11685
11195	11695

(2) 30 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10725	11225
10755	11255
10785	11285
10815	11315
10845	11345
10875	11375

10905.....11405
10935.....11435
10965.....11465
10995.....11495
11025.....11525
11055.....11555
11085.....11585
11115.....11615
11145.....11645
11175.....11675

(i) * * * (formerly (e))

(j) * * * (formerly (f))

(k) * * * (formerly (g))

Section 21.710 Limitations on path lengths and channel loading.

(a) The distance between end points of a fixed link must equal or exceed the value set forth in the table below or the EIRP must be reduced in accordance with the equation set forth below.

Frequency Band (MHz)	Minimum path length (km)
Below 1,850	n/a
1,850 to 7,125	17
10,550 to 13,250	5
Above 17,700	n/a

(b) For paths shorter than those specified in the Table, the EIRP shall not exceed the value derived from the following equation.

EIRP = 30 - 20 log[A/B], dBW

Where:

EIRP = Equivalent isotropic radiated power in dBW.
A = Minimum path length from the Table for the frequency band in kilometers.
B= The actual path length in kilometers.

NOTE: Automatic transmit power control may be used to meet this requirement up to a 3 dB increase in EIRP.

(c) Upon an appropriate technical showing, applicants and licensees unable to meet the minimum path length requirement may be granted an exception to these requirements.

(d) * * * (formerly (c))

III. Part 22 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 22 - PUBLIC MOBILE SERVICE

1. The authority citation in Part 22 continues to read:

AUTHORITY: 47 U.S.C. 154, 303, unless otherwise noted.

2. Subpart G is amended by revising section 22.501 to read as follows:

Section 22.501 Frequencies.

* * * * *

(e) On a shared basis with fixed stations in the Point-to-Point Microwave Radio Service, frequencies in the bands 2110-2130 MHz and 2160-2180 MHz may be authorized for use by control and repeater stations functioning in conjunction with the Public Land Mobile Service. The emission bandwidth shall be limited to the minimum necessary to serve the purpose required, including the applicant's future growth plans. No new assignments will be made in the 2160-2162 MHz band for stations located within 50 miles of the coordinates of the sites listed in section 21.901(c), except upon a showing that no alternative frequencies are available. Channel bandwidth in excess of 800 kHz will not be authorized. In each of these bands, the highest frequency that would not cause harmful interference to any other stations shall be assigned. Licensees in the 2110-2130 MHz and 2160-2180 MHz bands that may be required to relocate to other bands by emerging technology service providers are eligible for licensing under Part 21 in the 3700-4200, 5925-6425, 6525-6875, 10,550-10,680, and 10,700-11,700 MHz bands.

* * * * *

IV. Part 94 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 94 - PRIVATE OPERATIONAL-FIXED MICROWAVE SERVICE

1. The authority citation in Part 94 continues to read:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Subpart B is amended by revising section 94.45 to read as follows:

Section 94.45 Changes in authorized station requiring modification.

(a) * * *

(10) Any increase in authorized effective isotropic radiated power in excess of 3 dB (a 2-to-1 ratio);

* * * * *

3. Subpart C is amended by revising sections 94.61, 94.63, 94.65, 94.71, 94.73, 94.75, 94.77, 94.79, and 94.94 to read as follows:

Section 94.61 Applicability.

* * * * *

(b) Frequencies in the following bands are available for assignment to stations in the Private Operational-Fixed Microwave Service:

Frequency Band (MHz)	
928 to 929	(19) and (20).
932 to 932.5	(32).
932.5 to 935	(33).
941 to 941.5	(32).
941.5 to 944	(33) and (34).
952 to 960	(1) and (20).
1850 to 1990	(2).
2130 to 2150	(2) and (21).
2150 to 2160	(3).
2180 to 2200	(2) and (21).
2450 to 2500	(4) and (21).
2500 to 2690	(5) and (22).
3700 to 4200	(8) and (10).
5925 to 6425	(6) and (10).
6425 to 6525	(30) and (31).
6525 to 6575	(10) and (28).
6575 to 6625	(2) (10) and (28).
6625 to 6875	(2) (8) (10) and (28).
10,550 to 10,680	(10).
10,700 to 11,700	(10).
12,200 to 12,500	(2) (21) and (25).
12,500 to 12,700	(2) (6) (21) and (25).
12,700 to 13,200	(26).
13,200 to 13,250	(9) (14) and (21).
17,700 to 18,580	(6) (8) (10) (21) and (27).
18,580 to 18,820	(10) (17) and (21).
18,820 to 18,920	(21) and (24).
18,920 to 19,160	(10) (17) and (21).
19,160 to 19,260	(21) and (24).

19,260 to 19,700.....(10) (21) and (27).
21,200 to 22,000.....(10) (11) (12) (13) and (23).
22,000 to 23,600.....10) (12) (13) and (23).
31,000 to 31,300.....(23) and (29).
38,600 to 40,000.....(9) (18) and (23).
Bands above 40,000.....(16) and (23).

* * * * *

Section 94.63 Interference protection criteria for operational fixed stations.

(a) Before filing an application for new or modified facilities under this part, the applicant must perform a frequency engineering analysis to assure that the proposed facilities will not cause interference to existing or previously applied-for stations in this service of a magnitude greater than that specified in the criteria set forth in paragraph (b) of this section, unless otherwise agreed to in accordance with 94.15(b). As an exception to the above requirement, when the proposed facilities are to be operated in the bands 932-935 MHz, 941-944 MHz, 3,700-4,200 MHz, 5,925-6,425 MHz, 10,550-10,630 MHz, 10,700-11,700 MHz, 17,700-19,700 MHz, 21,200-21,800 MHz, 22,400-23,000 MHz, or 38,600-40,000 MHz (excluding those frequencies set out in Section 94.189), applicants shall follow the prior coordination procedure specified in Section 21.100(d) of this chapter. In addition, when the proposed facilities are to be operated in the bands 2,655-2,690 MHz or 12,500-12,700 MHz, applications shall also follow the procedures in Section 21.706(c) and (d) and the technical standards and requirements of part 25 of this chapter as regards licensees in the Satellite Communications Service. See also Section 94.77.

* * * * *

Section 94.65 Frequencies.

* * * * *

(g) 3,700 to 4,200 MHz. 20 MHz maximum authorized bandwidth, 210 to 460 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3715.2175	4175.2175
3715.6325	4175.6325
3716.0475	4176.0475

3716.4625	4176.4625
3716.8775	4176.8775
3717.2925	4177.2925
3717.7075	4177.7075
3718.1225	4178.1225
3718.5375	4178.5375
3718.9525	4178.9525
3719.3675	4179.3675
3719.7825	4179.7825
3735.2175	4195.2175
3735.6325	4195.6325
3736.0475	4196.0475
3736.4625	4196.4625
3736.8775	4196.8775
3737.2925	4197.2925
3737.7075	4197.7075
3738.1225	4198.1225
3738.5375	4198.5375
3738.9525	4198.9525
3739.3675	4199.3675
3739.7825	4199.7825

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3715.425	4175.425
3716.255	4176.255
3717.085	4177.085
3717.915	4177.915
3718.745	4178.745
3719.575	4179.575
3735.425	4195.425
3736.255	4196.255
3737.085	4197.085
3737.915	4197.915
3738.745	4198.745
3739.575	4199.575

(3) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3700.84	4160.84
3702.50	4162.50
3704.16	4164.16

3705.84	4165.84
3707.50	4167.50
3709.16	4169.16
3710.84	4170.84
3712.50	4172.50
3714.16	4174.16
3715.84	4175.84
3717.50	4177.50
3719.16	4179.16
3720.84	4180.84
3722.50	4182.50
3724.16	4184.16
3725.84	4185.84
3727.50	4187.50
3729.16	4189.16
3730.84	4190.84
3732.50	4192.50
3734.16	4194.16
3735.84	4195.84
3737.50	4197.50
3739.16	4199.16

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3702.5	4162.5
3707.5	4167.5
3712.5	4172.5
3722.5	4182.5
3727.5	4187.5
3732.5	4192.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3705 1	4165 1
3715 1	4175 1
3725 1	4185 1
3735 1	4195 1
3745	3955
3755	3965
3765	3975
3775	3985
3785	3995

3795	4005
3805	4015
3815	4025
3825	4035
3835	4045
3845	4055
3855	4065
3865	4075
3875	4085
3885	4095
3895	4105
3905	4115
3915	4125
3925	4135
3935	4145
3945	4155

1 Alternate channels.

(6) 20 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
3710 1	4170 1
3730 1	4190 1
3750	3970
3770	3990
3790	4010
3810	4030
3830	4050
3850	4070
3870	4090
3890	4110
3910	4130
3930	4150

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(h) 5,925 to 6,425 MHz. 30 MHz maximum authorized bandwidth, 250 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.2175	6175.2175
5925.6375	6175.6375
5926.0475	6176.0475
5926.4625	6176.4625
5926.8775	6176.8775
5927.2925	6177.2925
5927.7075	6177.7075
5928.1225	6178.1225
5928.5375	6178.5375
5928.9525	6178.9525
5929.3675	6179.3675
5929.7825	6179.7825
6170.2175	6420.2175
6170.6325	6420.6325
6171.0475	6421.0475
6171.4625	6421.4625
6171.8775	6421.8775
6172.2925	6422.2925
6172.7075	6422.7075
6173.1225	6423.1225
6173.5375	6423.5375
6173.9525	6423.9525
6174.3675	6424.3675
6174.7825	6424.7875

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.425	6175.425
5926.255	6176.255
5927.085	6177.085
5927.915	6177.915
5928.745	6178.745
5929.575	6179.575
6170.425	6420.425
6171.255	6421.255
6172.085	6422.085
6172.915	6422.915
6173.745	6423.745
6174.575	6424.575

(3) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5925.84	6175.84
5927.50	6177.50
5929.16	6179.16
6110.84	6360.84
6112.50	6362.50
6114.16	6364.16
6115.84	6365.84
6117.50	6367.50
6119.16	6369.16
6120.84	6370.84
6122.50	6372.50
6124.16	6374.16
6125.84	6375.84
6127.50	6377.50
6129.16	6379.16
6130.84	6380.84
6132.50	6382.50
6134.16	6384.16
6135.84	6385.84
6137.50	6387.50
6139.16	6389.16
6140.84	6390.84
6142.50	6392.50
6144.16	6394.16
6145.84	6395.84
6147.50	6397.50
6149.16	6399.16
6150.84	6400.84
6152.50	6402.50
6154.16	6404.16
6155.84	6405.84
6157.50	6407.50
6159.16	6409.16
6160.84	6410.84
6162.50	6412.50
6164.16	6414.16
6165.84	6415.84
6167.50	6417.50
6169.16	6419.16
6170.84	6420.84
6172.50	6422.50
6174.16	6424.16

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6112.5	6362.5
6117.5	6367.5
6122.5	6372.5
6127.5	6377.5
6132.5	6382.5
6137.5	6387.5
6142.5	6392.5
6147.5	6397.5
6152.5	6402.5
6157.5	6407.5
6162.5	6412.5
6167.5	6417.5

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5935	6185
5945	6195
5955	6205
5965	6215
5975	6225
5985	6235
5995	6245
6005	6255
6015	6265
6025	6275
6035	6285
6045	6295
6055	6305
6065	6315
6075	6325
6085	6335
6095	6345
6105	6355
6115 1	6365 1
6125 1	6375 1
6135 1	6385 1
6145 1	6395 1

6155 1	6405 1
6165 1	6415 1

1 Alternate channels

(6) 30 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
5945	6195
5975	6225
6005	6255
6035	6285
6065	6315
6095	6345
6125 1	6375 1
6155 1	6405 1

1 Alternate channels. These channels are set aside for narrow bandwidth systems and should be used only if all other channels are blocked.

(i) 6,525 to 6,875 MHz. 10 MHz maximum authorized bandwidth, 160 to 345 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.2175	6870.2175
6525.6325	6870.6325
6526.0475	6871.0475
6526.4625	6871.4625
6526.8775	6871.8775
6527.2925	6872.2925
6527.7075	6872.7075
6528.1225	6873.1225
6528.5375	6873.5375
6528.9525	6873.9525
6529.3675	6874.3675
6529.7825	6874.7825

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6525.425	6870.425
6526.255	6871.255
6527.085	6872.085
6527.915	6872.915
6528.745	6873.745
6529.575	6874.575

(3) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6548.34	6728.34
6550.00	6730.00
6551.66	6731.66
6558.34	6738.34
6560.00	6740.00
6561.66	6741.66
6588.34	6748.34
6590.00	6750.00
6591.66	6751.66
6598.34	6758.34
6600.00	6760.00
6601.66	6761.66
6608.34	6768.34
6610.00	6770.00
6611.66	6771.66
6618.34	6778.34
6620.00	6780.00
6621.66	6781.66
6628.34	6788.34
6630.00	6790.00
6631.66	6791.66
6638.34	6798.34
6640.00	6800.00
6641.66	6801.66
6648.34	6808.34
6650.00	6810.00
6651.66	6811.66
6658.34	6818.34
6660.00	6820.00
6661.66	6821.66
6668.34	6828.34
6670.00	6830.00

6671.66	6831.66
6678.34	6838.34
6680.00	6840.00
6681.66	6841.66
6688.34	6848.34
6690.00	6850.00
6691.66	6851.66
6698.34	6858.34
6700.00	6860.00
6701.66	6861.66
6708.34	6868.34
6710.00	6870.00
6711.66	6871.66

(4) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6550	6730
6560	6740
6590	6750
6600	6760
6610	6770
6620	6780
6630	6790
6640	6800
6650	6810
6660	6820
6670	6830
6680	6840
6690	6850
6700	6860
6710	6870 1

1 Use of this frequency is authorized on a non-interference basis to broadcast operations in the band 6875-7125 MHz.

(5) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
6545 1	6715 1
6555 1	6725 1
6565	6735
6585	6745

6605	6765
6615	6775
6625	6785
6635	6795
6645	6805
6655	6815
6665	6825
6675	6835
6685	6845
6695	6855
6705	6865
6535 2	6575 2

1 These frequencies may be assigned for unpaired use.
2 Available only for emergency restoration, maintenance bypass, or other temporary-fixed purposes. Such uses are authorized on a non- interference basis to other frequencies in this band. Interference analysis required by Section 94.63(a) does not apply to this frequency pair.

(j) 10,550 to 10,680 MHz. 5 MHz maximum authorized bandwidth, 65 MHz separation:

(1) 400 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.2175	10670.2175
10605.6325	10670.6325
10606.0475	10671.0475
10606.4625	10671.4625
10606.8775	10671.8775
10607.2925	10672.2925
10607.7075	10672.7075
10608.1225	10673.1225
10608.5375	10673.5375
10608.9525	10673.9525
10609.3675	10674.3675
10609.7825	10674.7825
10610.2175	10675.2175
10610.6325	10675.6325
10611.0475	10676.0475
10611.4625	10676.4625
10611.8775	10676.8775
10612.2925	10677.2925
10612.7075	10677.7075
10613.1225	10678.1225
10613.5375	10678.5375
10613.9525	10678.9525

10614.3675	10679.3675
10614.7825	10679.7825

(2) 800 kHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10605.425	10670.425
10606.255	10671.255
10607.085	10672.085
10607.915	10672.915
10608.745	10673.745
10609.575	10674.575
10610.425	10675.425
10611.255	10676.255
10612.085	10677.085
10612.915	10677.915
10613.745	10678.745
10614.575	10679.575

(3) 1.25 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10560.625	10625.625
10561.875	10626.875
10563.125	10628.125
10564.375	10629.375

(4) 1.6 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10565.84	10630.84
10567.50	10632.50
10569.16	10634.16
10570.84	10635.84
10572.50	10637.50
10574.16	10639.16
10575.84	10640.84
10577.50	10642.50
10579.16	10644.16
10580.84	10645.84

10582.50	10647.50
10584.16	10649.16
10585.84	10650.84
10587.50	10652.50
10589.16	10654.16
10590.84	10655.84
10592.50	10657.50
10594.16	10659.16
10595.84	10660.84
10597.50	10662.50
10599.16	10664.16
10600.84	10665.84
10602.50	10667.50
10604.16	10669.16
10605.84	10670.84
10607.50	10672.50
10609.16	10674.16
10610.84	10675.84
10612.50	10677.50
10614.16	10679.16

(5) 2.5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.25	10616.25
10553.75	10618.75
10556.25	10621.25
10558.75	10623.75
10561.25	10626.25
10563.75	10628.75
10566.25	10631.25
10568.75	10633.75
10571.25	10636.25
10573.75	10638.75
10576.25	10641.25
10578.75	10643.75
10581.25	10646.25
10583.75	10648.75
10586.25	10651.25
10588.75	10653.75
10591.25	10656.25
10593.75	10658.75
10596.25	10661.25
10598.75	10663.75
10601.25	10666.25
10603.75	10668.75
10606.25	10671.25
10608.75	10673.75

10611.25	10676.25
10613.75	10678.75

(6) 3.75 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.875	10616.875
10555.625	10620.625
10559.375	10624.375
10563.125	10628.125

(7) 5 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10567.5	10632.5
10572.5	10637.5
10577.5	10642.5
10582.5	10647.5
10587.5	10652.5
10592.5	10657.5
10597.5	10662.5
10602.5	10667.5

(k) 10,700 to 11,700 MHz. 30 MHz maximum authorized bandwidth, 500 MHz separation:

(1) 10 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10705	11205
10715	11215
10725	11225
10735	11235
10745	11245
10755	11255
10765	11265
10775	11275
10785	11285
10795	11295
10805	11305
10815	11315

10825	11325
10835	11335
10845	11345
10855	11355
10865	11365
10875	11375
10885	11385
10895	11395
10905	11405
10915	11415
10925	11425
10935	11435
10945	11445
10955	11455
10965	11465
10975	11475
10985	11485
10995	11495
11005	11505
11015	11515
11025	11525
11035	11535
11045	11545
11055	11555
11065	11565
11075	11575
11085	11585
11095	11595
11105	11605
11115	11615
11125	11625
11135	11635
11145	11645
11155	11655
11165	11665
11175	11675
11185	11685
11195	11695

(2) 30 MHz bandwidth channels:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10725	11225
10755	11255
10785	11285
10815	11315
10845	11345
10875	11375

10905.....11405
10935.....11435
10965.....11465
10995.....11495
11025.....11525
11055.....11555
11085.....11585
11115.....11615
11145.....11645
11175.....11675

(l) * * * (formerly (h))

(m) * * * (formerly (j))

(n) * * * (formerly (k))

(o) * * * (formerly (l))

(p) * * * (formerly (m))

(q) Frequency diversity transmission will not be authorized in this service in the absence of a factual showing that the required communications cannot practically be achieved by other means. Where frequency diversity is deemed to be justified on a protection channel basis, it shall be limited to one protection channel for the bands 3,700-4,200 MHz, 5,925-6,425 MHz, and 6,525-6,875 MHz, and a ratio of one protection channel for three working channels for the bands 10,550-10,630 MHz and 10,700-11,700 MHz. In the bands 3,700-4,200 MHz, 5,925-6,425 MHz, and 6,525-6,875 MHz, no frequency diversity protection channel will be authorized unless there is a minimum of three working channels, except that where a substantial showing is made that a total of three working channels will be required within three years, a protection channel may be authorized simultaneously with the first working channel. A protection channel authorized under such exception will be subject to termination if applications for the third working channel are not filed within three years of the grant date of the applications for the first working channel. Where equipment employing digital modulation techniques with cross-polarized operation on the same frequency is used, the protection channel authorized under the above conditions may be considered to consist of both polarizations of the protection frequency where such is shown to be necessary.

Section 94.71 Emission and bandwidth limitations.

* * * * *

(b) The maximum bandwidth that will be authorized per frequency is set out in the table that follows. Regardless of the maximum

authorized bandwidth specified for each frequency band, the Commission reserves the right to issue a license for less than the maximum bandwidth if it appears that a lesser bandwidth would be sufficient to support an applicant's intended communications.

Frequency Band (MHz)	Maximum authorized bandwidth
928-929	12.5, 25 kHz 1 7
932-932.5, 941-941.5	12.5 kHz 1
932.5-935, 941.5-944	12.5, 25, 50, 100, 200 kHz 1
952-960	12.5, 25, 50, 100, 200 kHz 1 6
1850-1990	5 or 10 MHz 1
2130-2150	800 or 1600 kHz 1
2150-2160	10 MHz
2180-2200	800 or 1600 kHz 1
2450-2483.5	625 kHz 2
2483.5-2500	800 kHz
2650-2680	6 MHz 3
2686.9375-2688.9375	125 kHz 3
3700-4200	20 MHz
5925-6425	30 MHz
6425-6525	25 MHz
6525-6875	10 MHz
10,550-10,680	5 MHz
10,700-11,700	30 MHz
12,200-12,700	10 or 20 MHz 1
13,200-13,250	25 MHz
17,700-18,140	80 MHz
18,140-18,142	2 MHz
18,142-18,580	6 MHz
18,580-18,820	20 MHz
18,820-18,920	10 MHz
18,920-19,160	20 MHz
19,160-19,260	10 MHz
19,260-19,700	80 MHz
21,200-23,600	up to 100 MHz 5
31,000-31,300	25 or 50 MHz
38,600-40,000	up to 50 MHz
Bands above 40,000 4	

* * * * *

Section 94.73 Power limitations.

(a) On any authorized frequency, the average power delivered to an antenna in this service shall be the minimum amount of power necessary to carry out the communications desired. Application of this principle shall include, but not be limited to, requiring a licensee who replaces one or more of his antennas with larger antennas to reduce his antenna input power by an amount appropriate to

compensate for the increased primary lobe gain of the replacement antenna(s). In no event shall the average equivalent isotropically radiated power (EIRP), as referenced to an isotropic radiator, exceed the values specified below. Further, the output power of a transmitter on any authorized frequency in this service shall not exceed the following:

Frequency Band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP 2	
	Fixed(W)	Mobile(W)	Fixed(dBW)	Mobile(dBW)
928 to 929	5.0		+17	
932 to 932.5			+17	
932.5 to 935	20.0		+40	
941 to 941.5			+30	
941.5 to 944	20.0		+40	
952 to 960	20.0		+40	
1850 to 1990	20.0		+45	
2130 to 2150	20.0		+45	
2150 to 2160	20.0		+45	
2180 to 2200	20.0		+45	
2450 to 2500	20.0		+45	
2500 to 2686	10.0		+45	
2686 to 2690	0.25		+45	
3700 to 4200	20.0		+50	
5925 to 6425	20.0		+50	
6425 to 6525		20.0		+35
6525 to 6875	20.0		+50	
10,550 to 10,680 9	10.0		+50	
10,700 to 11,700	10.0		+50	
12,200 to 12,700	10.0		+50	
12,700 to 13,250	10.0		+50	
17,700 to 18,600	10.0		+55	
18,600 to 18,800	10.0		+35	
18,800 to 19,700	10.0		+55	
21,200 to 23,600	10.0		+40	
31,000 to 31,300	0.05	0.05		
38,600 to 40,000	10.0		+40	

* * * * *

Section 94.75 Antenna Limitations.

* * * * *

(b) Directional antennas shall meet the performance standards (for parallel polarization) indicated in the following table:

Frequency (MHz)	Category	Maximum beam-width to 3 dB points (included angle in degrees)	Minimum antenna gain (dBi)	Minimum radiation suppression to angle in degrees from centerline of main beam in decibels						
				5° to 10°	10° to 15°	15° to 20°	20° to 30°	30° to 100°	100° to 140°	140° to 180°
932.5 to 935	A	14.0	n/a		6	11	14	17	20	24
941.5 to 944	B	20.0	n/a			6	10	13	15	20
952 to 960	A	14.0	n/a		6	11	14	17	20	24
	B	20.0	n/a			6	10	13	15	20
1,850 to 2,690	A	5.0	n/a	12	18	22	25	29	33	39
	B	8.0	n/a	5	18	20	20	25	28	36
3,700 to 4,200	A	n/a	36	23	29	33	36	42	55	55
	B	n/a	36	20	24	28	32	32	32	32
5,925 to 6,875	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
10,550 to 10,680	A	3.4	34	20	24	28	32	35	55	55
	B	3.4	34	20	24	28	32	35	35	39
10,700 to 11,700	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
11,700 to 13,250	A	1.0	n/a	23	28	35	39	41	42	50
	B	2.0	n/a	20	25	28	30	32	37	47
17,700 to 19,700	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
21,200 to 23,600	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
27,500 to 29,500	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36
31,000 to 31,300	n/a	4.0	38	n/a	n/a	n/a	n/a	n/a	n/a	n/a
38,600 to 40,000	A	n/a	38	25	29	33	36	42	55	55
	B	n/a	38	20	24	28	32	35	36	36

* * * * *

Section 94.77 Interference to geostationary-satellites.

These limitations are necessary to minimize the probability of harmful interference to reception in the bands 2655-2690 MHz, 5925-6875 MHz, and 12.7-12.75 GHz on board geostationary-space stations in the fixed-satellite service (Part 25). Stations authorized in the band 2655-2690 MHz prior to July 1, 1976 that exceed the power levels in paragraphs (a) and (b) of this section are permitted to operate indefinitely, provided that the operation of such stations does not result in harmful interference to reception in this band on board geostationary space stations.

(a) 2655 to 2690 MHz and 5925 to 6875 MHz. * * *

* * * * *

Section 94.79 Minimum path lengths for fixed links.

(a) The distance between end points of a fixed link must equal or exceed the value set forth in the table below or the EIRP must be reduced in accordance with the equation set forth below.

Frequency Band (MHz)	Minimum path length (km)
Below 1,850	n/a
1,850 to 7,125	17
10,550 to 13,250	5
Above 17,700	n/a

(b) For paths shorter than those specified in the Table, the EIRP shall not exceed the value derived from the following equation.

EIRP = 30 - 20 log[A/B], dBW

Where:

EIRP = Equivalent isotropic radiated power in dBW.
A = Minimum path length from the Table for the frequency band in kilometers.
B= The actual path length in kilometers.

NOTE: Automatic transmit power control may be used to meet this requirement pursuant to Section 94.45.

(c) Upon an appropriate technical showing, applicants and licensees unable to meet the minimum path length requirement may be granted an exception to these requirements.

NOTE. Links authorized prior to April 1, 1987 need not comply with this requirement.

Section 94.94 Microwave digital modulation.

Microwave transmitters employing digital modulation techniques in the bands 10,550-10,680 and 17,700-19,700 MHz shall transmit at bit rate, in bits per second (bps), equal to or greater than the authorized bandwidth in Hertz (e.g., to be acceptable, equipment transmitting at a 20 Mbps rate must not require an authorized bandwidth greater than 20 MHz). In the 17,700-19,700 MHz band, this bps/Hz standard is independent of the antenna (polarization) used, frequency reuse, or how the system is configured. For the 3,700-4,200 MHz, 5,925-6,425 MHz, 6,525-6,875, 10,550-10,630 MHz, and 10,700-11,700 MHz point-to-point microwave bands, standards of Section 21.122 shall be met.

NOTE: Systems authorized in the 17,700-19,700 MHz band prior to December 1, 1988 may install equipment with no minimum bit rate.

Alcatel Petition (RM-8004) -- Comments
American Personal Communications
American Petroleum Institute
Association of American Railroads
Centel Corporation
Communications Transmission, Inc.
Comsearch
GE American Communications, Inc.
GTE Service Corporation
Harris Corporation - Farinon Division
Home Box Office
Hughes Communications Galaxy
Large Public Power Council
MCI Telecommunications Corporation
Microwave Radio Corporation
National Association of Broadcasters, Radio-Television News Directors Association, The Cable-Satellite Public Affairs Network, The Association for Maximum Service Television, Inc. and Turner Broadcasting System, Inc.
National Spectrum Managers Association
Pacific Telesis Group
Spatial Communications, Inc.
Telecommunications Industry Association Fixed Point to Point Communications Section
Utilities Telecommunications Council

Alcatel Petition -- Reply Comments
Alcatel Network Systems, Inc.
Bonneville International Corporation
Capital Cities/ABC Inc.
CBS Inc.
Digital Microwave Corporation
GTE Service Corporation
Harris Corporation - Farinon Division
Home Box Office
Hughes Communications Galaxy
IDB Communications Group, Inc.
National Public Radio, Inc.
Pan American Satellite
United Video, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION FCC 92-262
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 76, Subpart J,	)	
Section 76.501 of the Commission's	)	MM Docket No. 82-434
Rules and Regulations to Eliminate	)	
the Prohibition on Common Ownership	)	
of Cable Television Systems and	)	
National Television Networks	)	

REPORT AND ORDER

Adopted: June 18, 1992 ; Released: July 17, 1992

By the Commission: Commissioner Quello concurring in part, dissenting in part and issuing a separate statement; Commissioner Marshall concurring and issuing a separate statement; Commissioner Barrett concurring in part, dissenting in part and issuing a separate statement; Commissioner Duggan issuing a separate statement.

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I. INTRODUCTION

1. This Report and Order relaxes Section 76.501(a)(1) of our rules,[1] which prohibits common ownership of cable television systems and national television networks (the "network-cable cross-ownership" rule). In light of significant changes that have occurred in the video marketplace since the rule's adoption in 1970, we conclude that the rule in its current form is no longer needed to achieve its original objectives: to curb network dominance of the video marketplace and to protect the cable industry in its incipient stage of development. In addition, we believe that substantial public benefits -- such as healthier, more diversified network operations and the potential for increased cable competition -- could occur through relaxing the cross-ownership restriction. Therefore, we decide to allow significant network entry into cable television ownership. We further determine, however, that network entry into cable ownership should be subject to judicious structural constraints that will effectively preclude possible anticompetitive conduct and ensure a diverse, competitive video marketplace. Accordingly, we will revise the rule to permit networks to own cable systems, provided that no such combination exceeds (i) 10% of homes passed by cable nationwide, and (ii) 50% of homes passed by cable within an ADI. We will not apply the local limit to instances where the network-owned cable system faces a "competing" system. These measures should effectively prevent potential abuses by network-cable owners by reducing those owners' incentives to pursue various discriminatory practices. However, as an additional measure, we will entertain petitions for special relief in order to remedy any individual instances of anticompetitive action in deleting or repositioning local broadcast signals on network-owned cable systems. Where we find that anticompetitive conduct has occurred, we will order the cable operator to carry the station, or to carry it on its former channel, as appropriate. Finally, in three years we will review the continued necessity of retaining these restrictions on the broadcast networks' participation in the cable industry. We conclude that these modifications to the rule serve our interest in fostering a diverse and competitive video marketplace, without imposing excessively burdensome restrictions on broadcast networks or cable systems.

II. BACKGROUND

2. When the Commission adopted the network-cable cross-ownership ban in 1970,[2] it expressed concern that permitting television networks to own cable

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[1] 47 C.F.R. Section 76.501(a)(1) was originally adopted as 47 C.F.R. Section 74.1131. This rule provides that "[n]o cable television system (including all parties under common control) shall carry the signal of any television broadcasting station if such system directly or indirectly owns, operates, controls, or has an interest in. . . a national television network (such as ABC, CBS, or NBC)."

[2] Second Report and Order in Docket 18397, 23 FCC 2d 816 (1970), recon. denied, 39 FCC 2d 377 (1973).

systems could inhibit the cable industry's growth and competitiveness, given that its development was at a critical stage. More generally, the Commission also stated that the networks already dominated the video marketplace through their affiliated stations, prime-time programming, and national television audience share.[3] Although the Commission did not elaborate further on the rule's rationale, its policy concerns were illuminated in its discussion of the broadcast-cable cross-ownership rule, which was simultaneously adopted and which prohibits common ownership of local television stations and cable systems that serve the same area.[4] This discussion suggests that the principal concerns underlying the network-cable rule were that: (1) the networks could restrict the amount of competing programming supplied by their cable television systems due to their incentive to maximize the audience for their own network programming; (2) network-owned cable systems could refuse to carry a rival network's programming, thus hindering the development of new cable networks and limiting network competition nationwide; and (3) networks could enhance their dominance in supplying television programming by owning cable systems, thus limiting the diversity of voices in the video marketplace.[5]

3. In the early 1980's, several studies questioned the necessity of the network-cable cross-ownership rule and emphasized the increasing competition within the video marketplace. In 1982, the Commission cited these studies in proposing to eliminate the cross-ownership rule because of growth in the video marketplace as well as cable television's development.[6] In 1988, the Commission solicited additional comments on any intervening developments in the video marketplace, both economic and regulatory, that were relevant to the proposal to eliminate the rule.[7]

4. In December 1991, in response to continuing fundamental changes within the video marketplace,[8] we determined that it was useful to revisit

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[3] 23 FCC 2d at 821.

[4] 47 C.F.R. § 76.501(a)(2). See Second Report and Order, 23 FCC 2d at 819; 39 FCC 2d at 391. The Cable Communications Policy Act of 1984 codified the Commission's broadcast-cable cross-ownership rule but not the network-cable cross-ownership rule. See Pub.L. No. 98-549, 98 Stat. 2779 (1984), Section 613(a). 47 U.S.C. § 533(a).

[5] See Notice of Proposed Rulemaking ("Notice"), CT Docket No. 82-434, 91 FCC 2d 76 (1982).

[6] See Notice at 79.

[7] See Further Notice of Proposed Rule Making ("Further Notice"), BC Docket No. 82-434, 3 FCC Rcd 5283 (1988).

[8] These marketplace changes were closely examined in a recent Commission staff report. See F. Setzer and J. Levy, Broadcast Television in a Multichannel Marketplace ("Staff Report"), FCC Office of Plans and Policy Working Paper No. 26, June 1991.

the network-cable cross-ownership rule as part of our overall review of the Commission's television regulations. Our Second Further Notice of Proposed Rulemaking[9] noted that the cable television industry had grown into a substantial competitive force in the video marketplace and that the competitive imbalance between cable and the networks that led to the rule's adoption had fundamentally shifted. We suggested that allowing the broadcast networks to enter the cable television business could enhance network efficiency and generate public benefits. We observed that the networks would appear especially suited for owning and operating cable systems due to their experience and expertise in selling national advertising, distributing programming, producing news broadcasts, and coordinating operations with affiliated stations. At the same time, we also recognized concerns raised in this proceeding by various parties that completely repealing the cross-ownership restriction could undermine competition and diversity in local and national video markets. Therefore, we invited comment on the rule's continued validity, as well as on options that would permit networks to own cable systems subject to various constraints. These options included allowing networks to own cable systems in "large" or "competitive" markets, or where second competitive cable systems exist. We also requested comment on the merits of options that would allow networks to own cable systems up to a national subscriber limit, or subject to must carry and discrimination requirements.

III. SUMMARY OF COMMENTS

A. Comments Regarding the Continued Validity of the Rule

5. A number of parties favor repealing the network-cable cross-ownership rule, including the Department of Justice (DOJ), the National Telecommunications and Information Administration (NTIA), the three broadcast television networks, the National Cable Television Association (NCTA), the Community Antenna Television Association (CATA), as well as Action for Children's Television and Henry Geller (ACT).[10] These parties argue that the rule no longer serves the public interest or consumer welfare, given that it inhibits competition in the video marketplace and prevents the networks from realizing efficiencies through vertical integration that could benefit both broadcast and cable television as well as consumers. Furthermore, the parties claim that the rule's original rationale -- to prevent the broadcast networks from dominating the video marketplace or from inhibiting the development of the cable television industry -- is no longer valid due to the

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[9] See Second Further Notice of Proposed Rulemaking ("Second FNPRM"), MM Docket No. 82-434, 7 FCC Rcd 586 (1991).

[10] A list of parties filing comments in this proceeding is given in Appendix A. DOJ and NTIA submitted late-filed comments that were included in this proceeding's record. Several parties address the merits of the network-cable cross-ownership rule in their comments to the Notice of Inquiry in MM Docket No. 91-221 regarding the changes in the video marketplace. Those comments have been considered and incorporated into this proceeding.

continued decline of the broadcast networks' audience share and financial base and the emergence of the cable industry as a substantial competitive force in producing and distributing video programming. These parties also believe that repealing the cross-ownership rule is necessary in order to ensure the viability of over-the-air broadcasting.

6. In opposition, numerous parties support retaining the rule, including the Network Affiliated Stations Alliance (NASA), the Association of Independent Television Stations (INTV), the National Association of Broadcasters (NAB), the Motion Picture Association of America (MPAA), the Office of the Chief Counsel for Advocacy of the United States Small Business Administration (CCA/SBA)[11], Malrite Communications Group, Inc. (Malrite), and Turner Broadcasting System, Inc. (Turner). These parties believe that the proponents of eliminating the rule have not shown a public interest beyond vague "efficiencies" and opportunities for "portfolio diversification," thus failing to create a basis for changing a rule that was intended to protect First Amendment interests by promoting diversity of media ownership. NASA adds that the networks fail to distinguish between the efficiencies that occur through networks participating as cable programmers, as is currently permitted under the rules, and the supposed efficiencies that could flow from owning cable systems. MPAA and CCA/SBA question the extent of the networks' expertise in operating cable systems, asserting instead that any such expertise extends only to producing cable programming.

B. Comments on Restrictions

7. In the Second FNPRM, we also sought comment on a variety of alternative proposals that could alleviate concerns raised in this proceeding, including options that would allow networks to own cable systems (i) in "large" or "competitive" markets, including where second competitive cable systems exist, (ii) up to a national subscriber limit, or (iii) subject to must carry and discrimination requirements. In addition, the Commission invited parties to propose any other alternative restrictions or modifications to the rule that they considered appropriate. Several parties, including NASA, INTV, NAB,[12] and MPAA, offer general support for adopting restrictions as a second-best option to retaining the rule, and recommend various measures for doing so. By comparison, ABC believes that none of the concerns raised by proponents of the cross-ownership ban justify retaining the rule, but it does not oppose certain restrictions against potential abuses. However, ABC states that various measures proposed by parties seeking to retain the rule are designed to protect against feared network

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[11] The Office of the Chief Counsel for Advocacy represents the interests of small businesses; although the Chief Counsel is located in the United States Small Business Administration, it operates independently of the Administrator of the SBA.

[12] NAB's comments include relevant portions of its comments responding to the Commission's video marketplace Notice of Inquiry, MM Docket No. 91-221.

conduct that ABC has no incentive to pursue.[13] CATA opposes the proposed restrictions and argues that imposing conditions upon network ownership of cable systems would create a disincentive for entry while inhibiting a network's ability to compete with other owners. CATA observes that even if restrictions are not adopted at this time, the Commission could impose restrictions in the future should they prove necessary. NCTA also opposes the proposed restrictions, arguing that they would harm cable operators, programmers and subscribers despite a lack of evidence that network-owned cable systems will actually pursue anticompetitive strategies; it further asserts that the Commission and courts have ample means to redress grievances in particular cases.[14]

IV. DISCUSSION

8. In the Second FNPRM, we recognized that continuing fundamental changes in the video marketplace warranted revisiting the issue of modifying or eliminating the network-cable cross-ownership prohibition.[15] Specifically, we observed that the cable industry today is a robust, independent enterprise, with over 10,000 systems and 80 networks offering an increasing diversity of programming that competes directly with over-the-air broadcast services. We also recognized that, in the midst of increasing competition from multichannel video services, the television networks would face a growing need to generate additional revenues to respond to declining audience shares and advertising sources. Based upon these changes and our analysis of the record in this proceeding, we find that the current network-cable cross-ownership rule no longer serves the public interest. Not only has the rule outlived its original purpose of fostering a competitive video marketplace, but it also may hamper competition by precluding three experienced market participants from owning cable systems, and by unnecessarily limiting the television networks' ability to diversify and generate other revenue streams. As discussed in detail below, we will thus modify the cross-ownership restriction to permit meaningful network participation in owning and operating cable systems. At the same time, we are cognizant of some commenters' concerns over the possibility that

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[13] Chris-Craft/United Group (Chris-Craft) as well as the National Association for the Advancement of Colored People and the League of United Latin American Citizens (NAACP/LULAC) agree that repealing the cross-ownership rule will promote competitiveness for broadcasters, although the parties state that eliminating the rule will serve the public interest only if competitive safeguards are adopted. Chris-Craft and Malrite also argue that the Commission should recommend that Congress eliminate the local broadcast station-cable cross ownership rule, although Chris-Craft supports identical safeguards in this context. ABC argues that the restriction should be reevaluated. See Comments of Chris-Craft/United Group, at 10; Comments of Capital Cities/ABC, at 31, n. 68.

[14] A detailed discussion of comments submitted in this proceeding is contained in Appendix B.

[15] See Second FNPRM, 7 FCC Rcd 587 (1991).

operators of network-owned cable systems could use their enhanced leverage to engage in certain anticompetitive practices to the detriment of local broadcast stations. As explained more fully below, we find that whatever its theoretical potential, such anticompetitive conduct is unlikely to actually occur, particularly in light of the structural restrictions we are imposing herein. Nevertheless, we find it appropriate to complement these structural measures by remedying specific instances of anticompetitive conduct local signals by operators of network-owned cable systems. In three years, we will review the continued necessity of retaining these restrictions on the broadcast networks' participation in the cable industry.

A. The Continued Validity of the Rule

9. Throughout this proceeding, we, as well as many of the commenting parties, have questioned the continued validity of the rule's original justification: to prevent network dominance or undue concentration in the video marketplace, and to promote growth in the infant cable industry. Given the competitive conditions of the contemporary video marketplace, we believe that this rationale has been seriously undermined. Indeed, we observe that most commenters agree that the rule's original rationale is no longer sufficient to sustain a per se prohibition against network-cable cross-ownership. We also point out that independent parties, including the DOJ[16] and NTIA,[17] have concluded that the rule is outdated, restrains competition and diversity in providing cable service, and lacks countervailing benefits. Similarly, the 1991 OPP Staff Report concluded that the rule prevents efficient use of programming and places broadcast networks under an artificial competitive handicap relative to multichannel rivals that benefit from dual revenue streams.[18]

10. We emphasize that the changing structure of the video marketplace is well-documented, with over 10,000 cable systems now operating in the United States, compared to 2,490 systems in 1970 when the rule was adopted. These systems reach over 90% of the nation's households, and serve over 60% of homes passed.[19] In view of this dramatic growth, our 1990 Cable Report concluded that cable was "no longer a fledgling industry."[20] At the same time, the

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16 See Comments of Department of Justice, MM Docket No. 82-434, November 29, 1982. See also Reply Comments of the Department of Justice, MM Docket No. 82-434, May 15, 1992 (late-filed).

17 See "Video Program Distribution and Cable Television: Current Policy Issues and Recommendations," NTIA Report No. 88-233, June 1988. See also Comments of NTIA, MM Docket No. 82-434, May 13, 1992 (late-filed).

18 See Staff Report, at 170.

19 See Television and Cable Factbook, Cable & Services Volume No. 59, Part II, 1991 Edition, C-390; Summary of Broadcasting and Cable, Broadcasting, Vol. 122 No. 21, May 18, 1992, at p. 51.

20 See Report in MM Docket No. 89-600, 5 FCC Rcd 5039 (1990).

broadcasting industry has grown from 962 to nearly 1500 television stations between 1976 and 1991.[21] As viewer choices have increased, broadcast network audience shares and real advertising revenues have fallen significantly in the last decade and are now substantially different, relative to comparable measures for cable, from the period when the rule was adopted. For example, given greater sources of video entertainment for American consumers, the proportionate viewing of broadcast network programming has declined sharply, as the three-network prime-time share of households fell from 90 to 60 between 1975 and 1991.[22] Meanwhile, network advertising revenues in real dollars reached a peak in 1984 and have continued to decline since. Network advertising has also fallen steadily relative to GNP since 1979, with the exception of 1982-1984.[23] Over the same time period, cable advertising and total subscriber revenues have grown substantially in real dollars, far outpacing the growth in GNP.[24] These developments convince us that the rule is no longer needed to protect a struggling cable industry, as it was originally designed to do, because the video marketplace now includes broadcast and cable industries that are both large and mature.

11. We further conclude that allowing networks to own cable systems in certain situations could affirmatively promote competition in the video marketplace and provide other public interest benefits. First, network ownership of cable systems would create opportunities for the broadcast networks to diversify their operations and to gain access to additional revenue sources. Such access to new revenue streams could help the television networks compete more effectively with multichannel providers in the video marketplace; it also could benefit the viewing public by enabling the networks to allocate additional funds to develop a greater diversity of programming. In addition, the public is likely to benefit from network entry as a result of the networks' related expertise in distributing programming to consumers, producing news broadcasts and other programming, and coordinating operations with affiliated stations. Although parties have questioned the extent of the networks' expertise in operating cable systems, we believe that their experience is sufficiently related to place the networks among the most likely

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[21] See Summary of Broadcasting and Cable, Broadcasting, Vol. 122 No. 21, May 18, 1992, at p. 51.

[22] See Veronis, Suhler & Associates, Communications Industry Forecast, June 1992, p. 71.

[23] Real network advertising revenues increased 28.6% between 1980 and 1984, but fell 18.4 % between 1984 and 1991. Based on data from McCann-Erickson, Inc., "Estimated Annual U.S. Advertising Expenditures," 1992; consumer price index, Economic Report of the President, transmitted to the Congress February 1992, U.S. Government Printing Office, (Washington: 1992), p. 361.

[24] While still substantially less than network advertising revenues, real cable advertising revenues grew over 2,000% between 1980 and 1991. See McCann-Erickson, Inc., "Estimated Annual U.S. Advertising Expenditures," April 1990; Cable Television Developments, NCTA, March 1992.

potential entrants into cable delivery. Consequently, we conclude that permitting network ownership of cable systems is consistent with our efforts to encourage greater competition in the cable industry,[25] as well as general policy goals to remove regulations that unnecessarily limit competition and industry growth. Moreover, as the networks develop more viable operations by adding another stable revenue source, we believe that the video marketplace could benefit from a more secure broadcast network structure, which again could enhance the quality and diversity of video programming available to viewers.

12. The opportunities for significant network entry into cable ownership are also important in view of the many technological and service innovations that appear to be imminent in the cable industry. In the past 10 years, the number of channels available to cable subscribers, which are more easily accessed because of remote control, has in many markets tripled or quadrupled.[26] At the same time, the percentage of television households owning one or more VCRs has grown from 1.1% in 1980 to 77% in 1991, and statistics show that, especially on weekends, a significant percentage of television viewers are watching movies rented from local video stores.[27] Indeed, consumer expenditures on videocassette rentals and purchases were $9.6 billion in 1989, an amount approximately equal to two-thirds of expenditures on cable subscriptions.[28] These developments have prompted some cable operators to enter the market for viewer-chosen movies. For example, Time Warner is implementing video-on-demand on a staggered basis on its cable system in New York City.[29] The development of digital compression technology promises to expand the capacity of existing cable plant even further and to make even more innovative services possible. In fact, the cable facilities of tomorrow are projected to offer 400 or more video channels. Such innovations not only will permit cable operators to offer video-on-demand, but they may also enable cable systems to offer a wide range of advanced video, voice, data, and other telecommunications services. We believe, therefore, that network entry into cable ownership will enable the broadcast networks to participate in these advanced services and thereby compete more effectively in the rapidly evolving video marketplace of the future.

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25 See e.g., Second Report and Order in Gen. Docket No. 90-54, FCC 91-302, released October 25, 1991; Order on Reconsideration in Gen. Docket No. 90-54, FCC 91-301, released October 25, 1991; and Further Notice of Proposed Rule Making, First Report and Order, and Second Further Notice of Inquiry, in CC Docket No. 87-266, FCC 91-334, released November 22, 1991.

26 In 1983, 48.7% of cable subscribers were served by systems with 30 or more channels, while 21.9% of subscribers had access to 12 or fewer channels. Comparable figures for 1990 were 89.3% and 1.3%, while almost 25% of cable subscribers had access to 54 or more channels. See Staff Report, at 84.

27 See Staff Report, at 106; Washington Post, May 17, 1992, p. H-4.

28 See Staff Report, at 108.

29 See Staff Report, at 86.

13. In addition, the Commission has previously observed that cable service has benefited from vertical integration between system operators and programmers, and the earlier Notices in this proceeding supported proposals to eliminate the rule by stating that similar economies could occur through network entry.[30] Specifically, we have stated that cable subscribers have benefited from MSO investment that has generated more original programming and a wealth of new viewing options for consumers.[31] Furthermore, vertical integration enables cable operators to improve the quality of their existing program services through increased program payments, if they believe that such investments will cause market penetration to increase. We believe that the broadcast networks' vertical integration into cable could serve the public interest in a similar manner by encouraging the development of additional cable programming services, particularly with respect to ventures initiated by the networks.[32]

14. We recognize that parties seeking to retain the rule raise arguments that large cable MSOs and the broadcast networks control many of the outlets for distributing programming in the video marketplace. We do not believe, however, that we must maintain an absolute prohibition against network-cable cross-ownership in order to protect competition and diversity. Our 1990 Cable Report stated that the cable industry's concentration has increased significantly as measured by the percentage of subscribers served by the largest MSO, as well as the percentage served by the top 4 and top 10 MSOs.[33] However, we also observed that alternative measures demonstrated that the industry was relatively unconcentrated in the national market.[34] Nonetheless, we stressed the importance of enhancing competition to incumbent cable systems. We believe that network entry may enhance such competition by enabling three additional communications companies to participate in the cable industry. Furthermore, while the networks remain a significant force in the video marketplace, we have accumulated substantial evidence that documents the

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[30] See Report in MM Docket No. 89-600, 5 FCC Rcd 5006-5011 (1990). See also Second FNPRM, at 588.

[31] Our 1990 Cable Report cites several examples where MSO investment enabled a programming service to remain in operation when it would have otherwise discontinued its programming, including instances of critical financial support to sustain Turner Broadcasting, C-SPAN, the Discovery Channel, and Black Entertainment Television. See Report in MM Docket No. 89-600, 5 FCC Rcd 5008, 5009 (1990).

[32] See ACT Comments, at 3.

[33] See Report in MM Docket No. 89-600, 5 FCC Rcd 5005 (1990).

[34] The Cable Report stated that commenters estimate that the Herfindahl-Hirschman Index (HHI) as of 1990 ranged between 458 and 800, which is below the DOJ threshold of 1000 for challenging mergers. See Report in MM Docket No. 89-600, 5 FCC Rcd 5005 (1990). Using industry data as of December 1991, we estimate that the HHI is approximately equal to 860. Cable Television Developments, NCTA, 1992, p. 14-A.

increasing competitive pressures that they face, as well as the vast changes in the market that have occurred since the cross-ownership rule was established. We thus conclude that network participation in the cable industry is unlikely to cause networks to create an undue concentration of power in the video marketplace, particularly in view of the large number of cable MSOs that now operate nationwide, as well as the conditions we impose on network entry that are described in detail below.

15. The arguments presented by parties seeking to retain the rule also focus on concerns that network-cable combinations could harm affiliated stations, as well as other broadcasters, in the local marketplace through various discriminatory practices, thus restricting competition and diversity in the video marketplace. Indeed, the new rationale offered by parties to support retaining the rule now focuses on the relationship between the networks and local broadcast stations. These parties raise concerns about the leverage that network-cable owners might have in negotiations with affiliated stations for reduced affiliate compensation, and other potential anticompetitive practices related to broadcast signal carriage on the cable system. Although the various scenarios for discrimination and bypassing could conceivably occur,[35] we believe that their merit as arguments to retain the rule is questionable because the strategies are inconsistent with one another and are contrary to the economic interests of network-cable owners. More specifically, the discrimination strategies are arguably unprofitable for network-cable owners given that they would (i) cause losses that offset gains in one area of a network-cable combination, (ii) undermine the asset value of the cable system, or (iii) damage affiliates after substantial investments and despite established relationships. We emphasize that broadcast networks continue to depend upon the audience reach they achieve through their affiliated stations as a distinct market advantage. Accordingly, they would be undermining their own long-term economic interests by engaging in a pattern of conduct designed to weaken the network-affiliate relationship. In addition, any abuses by network-cable owners would most likely occur in limited instances, which we could address through more specific measures rather than by retaining the current prohibition on cross-ownership. We also note that bypassing could occur in any event under the existing rule, and it is not clear that incentives for bypassing would change if networks owned cable systems. As a consequence, we believe that such competitive concerns can be successfully addressed by targeted regulation and, therefore, we need not retain the cross-ownership rule in its entirety.

16. Several parties also express concern that an MSO could acquire a network if the rule is repealed. To the extent that this scenario could occur, we believe that it does not require a separate regulatory response because network-owned cable systems and an MSO-owned network are operations with similar functions, regardless of which party initiates the acquisition.[36]

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[35] See para. 4, Appendix B.

[36] We also recognize, as DOJ observes, that Congress enacted Section 7 of the Clayton Act to prevent particular mergers or acquisitions that threaten to restrict competition, create market power or facilitate its exercise. See DOJ

Therefore, given the general level of competition in the video marketplace, we conclude that neither the public interest nor consumer welfare requires maintaining structurally separate broadcast network and cable enterprises through the network-cable cross-ownership rule. In addition, some parties question whether networks will actually provide new competition by entering local markets as a second competing multichannel system, or whether they will simply purchase existing cable systems. Even if direct competition between facilities does not occur to a great extent initially, enabling the networks to enter the field would permit them to become competing cable operators where the business opportunity arose. Moreover, by allowing network entry, additional programming competition and related efficiencies are likely to arise and bring benefits to the public.

17. We have concluded in this Report and Order that the rationale for the network-cable cross-ownership rule is no longer sufficient to sustain a per se prohibition against network entry into cable ownership. The Commission relied upon this same rationale when it adopted a rule to prohibit cross-ownership of broadcast television stations and cable systems that reach areas within the broadcast station's area of service. Therefore, for the reasons detailed above, we believe that the rationale for an absolute prohibition on broadcast-cable cross-ownership is no longer valid in light of the ongoing changes in the video marketplace. We also agree with Chris-Craft that the networks, local broadcasters, and cable operators each compete for viewers, advertising, and programming, and thus, that local broadcasters should have opportunities to enter the cable industry to the same extent as broadcast networks.[37] We recognize, however, that the Cable Communications Policy Act of 1984 codified the Commission's broadcast-cable cross-ownership rule,[38] and we accordingly lack jurisdiction to alter it in any way. Therefore, we recommend that Congress repeal the broadcast-cable cross-ownership rule to permit us to allow local broadcasters to own cable systems in their service areas.[39]

Comments, May 15, 1992, at 8.

[37] See Comments of Chris-Craft/United Group, at 10.

[38] See n. 4, supra.

[39] We note that the 1991 Staff Report recommended repeal of both the network-cable and broadcast-cable cross-ownership rules. See Staff Report, at 170. We also note that the Commission would be able to visit the issue of whether some restrictions, if any, should be imposed on broadcast ownership of cable systems if the broadcast-cable statutory restriction were repealed. Unless the statutory ban is relaxed, however, no broadcast-cable ventures can occur.

B. Modifications to the Rule

18. Although we conclude that the current network-cable cross-ownership restriction no longer serves the public interest, we recognize that there remains at least some possibility that network-cable operators could use their enhanced leverage to harm local broadcast stations through certain discriminatory practices. Therefore, we find it appropriate to adopt some limited structural measures designed to protect competition and diversity in the video marketplace.[40] Specifically, we will revise the rule to permit network-cable cross-ownership provided that such combinations do not exceed (i) 10% of homes passed by cable nationwide, and (ii) 50% of homes passed by cable within an ADI.[41] We will not apply the local limit to instances where the network-owned cable system faces a "competing" system, because we believe that direct competition between a cable system and another multichannel provider will further reduce the possibility of anticompetitive conduct by network-cable owners. We conclude that these limited structural restrictions will prevent potential abuses by network-cable owners by reducing such owners' incentives to pursue discriminatory practices.

19. National Ownership Limit. Based on the record in this proceeding, we adopt a 10% national limit on homes passed by cable systems owned by a network. This action is intended to foreclose the potential national dominance of network-cable owners and, thereby, to promote diversity in the video marketplace. The broadcast networks have already established a significant ownership presence in the video delivery marketplace through their owned-and-operated stations, and we believe that a national ownership limit will allow the networks to complement their existing operations without accumulating an undue portion of the outlets for delivering video programming. We note that commenters generally agree that any restrictions imposed in place of the cross-ownership rule should include a national ownership cap. We believe that the 10% limit on homes passed is a reasonable threshold that will not only permit opportunities for network entry into cable, but will also allow for growth to increase the potential benefits to the public from diversified network investments.[42] We reject proposals by NASA and INTV to establish a 5% national ownership threshold because we believe that this more stringent measure would limit the potential for the greater competition that we seek to promote through network entry. We also recognize that a national base of "cable subscribers" is more readily measurable than the "homes passed" base. However, we believe that, unlike a "homes passed" approach, a subscriber test -- especially in the context of applying both national and local ownership standards -- could discourage network-owned cable systems from adding subscribers. Additionally,

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[40] The revised cross-ownership rule is contained in Appendix D.

[41] We retain the definition of a "network" as established in the cross-ownership rule. See 47 C.F.R. § 76.501(a)(1).

[42] In this regard, we will consider waivers for network-cable combinations in excess of the 10% national ownership standard pursuant to our normal waiver standards. See WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

we observe that an ownership threshold measured according to "subscribers" is fundamentally less stable as compared to a measure defined by "homes passed," given the relatively frequent changes in cable subscribership. Accordingly, we will use a "homes passed" standard for applying the new ownership standards.

20. Local Ownership Limits. We will also adopt a 50% local limit on homes passed in an ADI by cable systems that are owned by networks. As described above, we will not apply any local limit to instances where the network-owned cable system faces a "competing" system.[43] We note that the affiliates and INTV believe that a limit on homes passed in an ADI, in addition to national limits, would prevent bypassing because a network could not purchase enough cable systems in a market to reach an area equivalent to the reach of the local broadcast station. This restriction would thus address one of the major concerns of parties seeking to retain the rule. In addition, we believe that the local ownership cap could provide a competitive constraint to address carriage and channel positioning concerns. Specifically, network-cable operators that encompass only a portion of an ADI market -- or an area smaller than the affiliate's coverage -- would arguably have incentives to treat affiliates and other local broadcast stations no less favorably than non-network owned cable systems.[44] We recognize that some parties contend that local caps are redundant if behavioral restrictions are used. However, we believe that local caps are necessary at the outset of this rule change and preferable to the other behavioral restrictions proposed in the Second FNPRM and the additional measures suggested by commenters. Moreover, the local ownership limit will provide an opportunity for us to evaluate whether network-owned cable systems operate any differently than cable systems owned by other entities.

21. We also note that NASA and INTV suggested a 25% local limit, while the broadcast networks and other parties opposed any local threshold. We believe that, unlike the 25% threshold, the 50% measure will not create an undue obstacle to network entry and growth in most ADIs, yet it will provide essentially the same check on conduct by network-owned cable systems as the more stringent standard.[45] The primary concerns raised in the record focused

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[43] A "competing system" is defined as in our effective competition rules, Section 76.33(a)(2)(ii) of the rules, 47 C.F.R. § 76.33(a)(2)(ii). For the purposes of this network-cable cross-ownership rule, however, a "competing" multichannel competitor also must be capable of providing carriage of local broadcast signals integrated within its service.

[44] See additional discussion that follows at paragraph 23, infra.

[45] Using a sample of ADIs to evaluate local ownership holdings and potential network-cable combinations, we note that networks could purchase a number of the incumbent cable systems in the selected ADIs, even in instances where large cable MSOs have significant holdings. For example, networks could purchase cable systems owned by TCI in ADIs including Orlando, FL; Richmond, VA; Cedar Rapids, IA; and Eugene, OR; networks could also acquire a substantial portion of TCI's holdings in Houston, TX and Pittsburgh, PA. Similarly, networks could purchase at least a substantial portion of the systems owned by

on network-cable dominance and anticompetitive conduct, and in this regard we emphasize that the local limit will prevent network-cable owners from completely controlling the cable systems in any ADI while simultaneously reducing the likelihood of discriminatory conduct.

22. In the Second FNPRM, we also proposed to permit networks to own cable systems in "large" or "competitive" markets, or where second competitive cable systems exist. With respect to the "large" market option, we conclude that permitting network entry in markets beyond the largest ADIs will bring substantial public benefits, particularly when conditioned by the other measures we have adopted. The record generally offers little supporting evidence for restricting network ownership of cable systems to large or competitive markets and we thus decline to adopt this proposed option. Certain parties have expressed a strong preference, however, for allowing network-cable combinations only as a "competing" cable system or other multichannel video provider. We agree that this approach could promote competition to incumbent cable systems in the markets where new systems might develop. Indeed, we hope to encourage network-cable entry as a second competitor, particularly because we have found that per-channel basic cable rates are generally significantly lower than the national average in the presence of such competition.[46] Accordingly, we believe that it is unnecessary to apply the local ownership limit to network-owned "competing" cable systems, given that such systems are already subject to the constraint of a direct substitute in the form of another multichannel video delivery service. However, we conclude that limiting cross-ownership opportunities to second competing systems could preclude many potential acquisitions by networks that could benefit competition in the video marketplace and, thus such a restriction, on balance, would not serve the public interest.

23. Remedies for Specific Cases of Anticompetitive Conduct. We also proposed in the Second FNPRM to permit networks to own local cable systems subject to must carry requirements or other anti-discrimination measures. We believe that the local ownership limit adopted in this Report and Order will mitigate most carriage and channel positioning concerns by preventing network-cable operators from acquiring cable systems that encompass an entire ADI. We also reiterate our belief that deliberate anticompetitive action by a network-cable entity against local broadcast television stations would undermine the value of the network's cable system. Nevertheless, even with the local limits in place, we recognize the possibility that specific, isolated instances of anticompetitive practices against individual local stations could occur. In order to deal with any such situations, we believe that it is appropriate --

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Time Warner in Orlando, FL, as well as all of their systems in Colorado Springs, CO. Television and Cable Factbook, Cable & Services Volume No. 59, 1991 Edition, Part I, p. A-15 ff.

[46] See Report in MM Docket No. 89-600, 5 FCC Rcd 5002 (1990).

and consistent with the courts' holdings in Quincy and Century[47] -- to adopt a narrowly-drawn remedy that requires network-owned cable operators who have dropped or repositioned a local station for anticompetitive reasons to restore the station to its prior carriage status. We will take this action upon an appropriate showing by the local station that a failure to restore carriage or channel position would engender significant harm to the station. Therefore, we will entertain complaints from local television stations alleging harm as a result of anticompetitive conduct by a network-owned cable system with respect to non-carriage or channel repositioning.

24. We set forth the following procedures for the complaint process. First, an operator of a network-owned cable system must provide 30 days' notice to any local station when the operator proposes to drop the station from the system or reposition it to another channel. This notice will allow the local broadcaster time to assess the competitive impact of the action, and to prepare itself and its viewers for the change should it have no objection. We would further expect that where the local station is dissatisfied with the cable operator's proposed action, the parties will utilize this 30-day period to reach a mutually agreeable resolution prior to the scheduled date for non-carriage or repositioning. Failure to comply with this notice requirement may be construed as evidence of anticompetitive intent by the system in taking the action against the station.[48]

25. Next, whenever a local broadcast station judges that it has suffered, or will suffer, competitive harm as a result of being dropped or repositioned by a network-owned cable system, the station may seek special relief from the Commission pursuant to Section 76.7 of our rules.[49] We will confer standing

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[47] See Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir.) clarified, 837 F.2d 517 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2014 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986). The further issue of whether must carry rules should be applied for other reasons to all cable systems is before us in another proceeding, which will address the efficacy and legality of a general must carry requirement. See Second Further Notice of Proposed Rulemaking, MM Docket 90-4, 6 FCC Rcd 4545 (1991). We emphasize that we do not intend for our action in this proceeding to prejudge any must carry issues raised in other pending Commission proceedings.

[48] We note that the 30-day notice requirement will effectively prevent local stations from unexpectedly being dropped or switched to another channel during a "sweeps" month. Nonetheless, in the event this should occur, we would act upon the broadcast station's complaint as expeditiously as possible to ensure that anticompetitive harm is not inflicted upon the station during these critical rating periods.

[49] 47 C.F.R. § 76.7. We are hereby amending this section to provide for an abbreviated pleading cycle for complaints arriving under the new rule. See Appendix D.

upon trade associations to file such petitions on behalf of member stations that have been dropped or repositioned by network-owned local cable systems.[50]

26. The petition, in accordance with Section 76.7 of our Rules, must state that: (1) a network-owned cable system has taken adverse action against the station (i.e., it has dropped or repositioned the station's signal against the station's wishes), or conclusively indicated that it will take such action, and (2) the station has been or will be significantly harmed by the adverse action. In pleading this second element of the prima facie case against a cable operator, the complainant must provide factual evidence showing that the station has lost or will lose access to a significant part of its audience as a result of the cable operator's adverse action. The complainant must also provide any evidence that would indicate that the cable operator's action was taken as a means of unfairly inhibiting competition for viewers, advertisers, and programming from the broadcaster in the local video market, rather than for legitimate business purposes. In its opposition, the network-cable operator may rebut the allegations by demonstrating that its actions were based not on anticompetitive reasons, but rather on legitimate efforts to serve the needs and interests of its subscribers.

27. In evaluating the request for special relief, we will consider, inter alia, the following factors: (1) the station's past and present ratings; (2) whether the cable operator's programming decision was supported by subscriber surveys or other data; (3) whether the cable operator replaced the station's signal with another broadcast station or cable channel in which the cable operator holds an equity interest, or whether the network owning such cable system has also bypassed the local station by providing network programming through its cable system; (4) whether the cable operator can sell a significant amount of local advertising on the replacement channel; (5) the ratings and format of the replacement channel compared with the dropped or repositioned station; (6) the cable system's channel capacity; (7) whether the cable operator provided adequate notice to the broadcast station; (8) whether the cable operator provided its subscribers with prior notice or received a substantial number of subscriber complaints; (9) whether the station was moved to a channel that is not easily reached by the system's subscribers; and (10) whether other cable systems in the market had dropped, repositioned or refused to carry the station, and any justifications for such actions. We stress that this list of factors is merely illustrative and does not foreclose the Commission from weighing any other relevant factor in evaluating an individual broadcaster's complaint. Moreover, no single factor will necessarily be determinative; rather, we will reserve the discretion to weigh all pertinent factors in light of the particular circumstances of each case. Where we find

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[50] Those using this alternative should be aware, in the event of subsequent litigation, of the potential applicability of Hunt v. Washington State Advertising Commission, 432 U.S. 333 (1977), and related cases on associational standing.

that special relief is warranted, we will order the cable operator to restore the carriage or channel position of the local station.[51]

28. We believe that this complaint process will deter network-owned cable systems from engaging in anticompetitive conduct through discriminatory carriage and channel positioning. Moreover, because this mechanism is designed "to put [the Commission] in a position to know" the extent of any actual problems that may arise, and to tailor relief where necessary, we believe that the complaint process passes constitutional muster.[52] In addition, we intend to address the need for general must carry rules, applicable to all cable systems, in a pending proceeding.[53]

29. We adopt the above structural limits and complaint procedures rather than imposing other possible restrictions that were recommended by parties to remedy concerns that could result from repealing the rule. First, we believe that the above measures will adequately address problems regarding carriage and channel positioning. We also note that feared changes in the network-affiliate rules cited by commenters were neither proposed in this proceeding, nor are they pending elsewhere. In the event that we should decide to re-examine the network-affiliate regulations in the future, we would consider the ramifications of such an action on the revised network-cable cross-ownership rule. In addition, we recognize that NASA and INTV recommend several broad behavioral restrictions in addition to must carry and bypass protection, but we find that these measures are unnecessary in light of the other measures that we adopt in this Report and Order. Furthermore, these additional measures would essentially reimpose the cross-ownership rule by removing incentives for -- or

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[51] A cable system that violates such an order will be subject to a forfeiture of up to $25,000 for a single act, or up to $250,000 for continuing actions. 47 U.S.C. § 503(b).

[52] See, e.g., Quincy, 768 F.2d at 1457; see also FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 802 (1978) (upholding similar structural regulations of the mass media as "a reasonable means of promoting the public interest in diversified mass communications"). We impose this regulatory enforcement regime pursuant to our jurisdiction over broadcasting and our "ancillary" jurisdiction over cable television, which includes the authority to regulate the signals carried by cable television systems. 47 U.S.C. §§ 152(a), 303(r); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699 (1984); FCC v. Midwest Video Corp., 440 U.S. 689, 706 (1979); United States v. Southwestern Cable Co., 392 U.S. 157, 177-78 (1968). This authority to provide competitive safeguards in connection with the modification of a network-cable regulation adopted in 1970, has not been altered by the 1984 Cable Act. See 47 U.S.C. § 544 (f) (generally prohibiting government regulation of the content or provision of cable services except any rule, regulation or order in effect on September 21, 1983, or that may be amended after that date, provided that such rule, regulation or order is not inconsistent with the express provisions of the Cable Act); United Video, Inc. v. FCC, 890 F.2d 1173, 1183 n. 5 (D.C. Cir. 1989).

[53] See n. 47, supra.

erecting substantial barriers to -- network entry, thus diluting the effect of the measured regulatory changes that we believe are justified.[54]

Review of the Modified Rule

30. The structural restrictions and complaint procedure implemented in this Report and Order are designed to address possible concerns regarding competition and diversity stemming from present conditions in the video marketplace. We believe that after a period of transition and further change in the marketplace, it may prove that the limitations are unwarranted. Accordingly, three years from the adoption of this Report and Order, we will institute a proceeding, which we will conclude within one year, to review the continuing necessity of retaining the rules we adopt today on network participation in the cable industry. As part of our review, we will take particular interest in any evidence that network-owned cable operators have acted anticompetitively toward local broadcast stations.

V. CONCLUSION

31. In this Report and Order, we relax the network-cable cross-ownership rule in response to significant changes in the video marketplace, concluding that an absolute ban is no longer in the public interest. We believe that substantial public benefits -- such as healthier, more diversified network operations and increased cable competition -- are likely to accrue from relaxing the cross-ownership restriction. We recognize the concerns raised in this proceeding that networks and cable operators could threaten competition and diversity in the video marketplace by using their combined leverage to harm local broadcast stations through various discriminatory practices. Therefore, in order to protect competition and diversity in today's video marketplace, we will permit broadcast networks to own cable systems subject to measured restrictions, which we intend to review after three years to determine whether they remain necessary.

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[54] We also decline to adopt attribution standards similar to those that now apply to cable-telephone cross-ownership rules. We believe that the necessity of adopting such stringent standards has not been demonstrated and that they could prevent certain beneficial financial arrangements between networks and cable operators. Furthermore, we note that the cable-telephone cross-ownership rules, including the attribution standards, are currently under review in the Further Notice of Proposed Rulemaking, First Report and Order, and Second Further Notice of Inquiry, CC Docket No. 87-266, 7 FCC Rcd 300 (1991). Finally, we are confident that our existing broadcast attribution standards adequately address questions of ownership and control in the context of network-cable cross-ownership.

VI. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Analysis

32. Included in Appendix C.

B. Ordering Clauses

33. Accordingly, IT IS ORDERED that, pursuant to Sections 2(a), 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152(a), 154(i), and 303(r), Part 76 of the Commission's Rules, 47 C.F.R. Part 76, IS AMENDED as set forth in Appendix C, below, effective August 31, 1992.

34. IT IS FURTHER ORDERED that MM Docket No. 82-434 IS TERMINATED.

35. For further information on this proceeding, contact James Coltharp, Policy and Rules Division, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

INITIAL COMMENTS
Deadline: March 23, 1992

1. ACTION FOR CHILDREN'S TELEVISION AND HENRY GELLER
2. ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.
3. CAPITAL CITIES/ABC, INC.
4. CBS, INC.
5. CHRIS-CRAFT/UNITED GROUP
6. BOBBIE CLINKENBEARD, COUNCILMEMBER, CITY OF DUNCAN, OKLAHOMA
7. COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.
8. COMPETITIVE CABLE ASSOCIATION
9. GROUP ONE BROADCASTING
10. MALRITE COMMUNICATIONS GROUP, INC.
11. MOTION PICTURE ASSOCIATION OF AMERICA, INC.
12. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS
13. NATIONAL ASSOCIATION OF BROADCASTERS
14. NATIONAL BROADCASTING COMPANY, INC.
15. NATIONAL CABLE TELEVISION ASSOCIATION, INC.
16. NETWORK AFFILIATED STATIONS ALLIANCE
17. OFFICE OF THE CHIEF COUNSEL FOR ADVOCACY OF THE UNITED STATES SMALL BUSINESS ADMINISTRATION
18. WASHINGTON AREA CITIZENS COALITION INTERESTED IN VIEWERS' CONSTITUTIONAL RIGHTS AND MEDIA ACCESS PROJECT

REPLY COMMENTS
Deadline: April 7, 1992

1. ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.
2. CAPITAL CITIES/ABC, INC.
3. MOTION PICTURE ASSOCIATION OF AMERICA, INC.
4. NATIONAL BROADCASTING COMPANY, INC.
5. NATIONAL CABLE TELEVISION ASSOCIATION, INC.
6. NETWORK AFFILIATED STATIONS ALLIANCE
7. TURNER BROADCASTING SYSTEM, INC.

LATE-FILED COMMENTS

1. THE NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (submitted May 13, 1992)
2. THE UNITED STATES DEPARTMENT OF JUSTICE (submitted May 15, 1992)

APPENDIX B

SUMMARY OF COMMENTS

A. Comments Regarding the Continued Validity of the Rule

1. Several parties favor repealing the network-cable cross-ownership rule, including the Department of Justice (DOJ), the National Telecommunications and Information Administration (NTIA), the three broadcast television networks, the National Cable Television Association (NCTA), the Community Antenna Television Association (CATA), as well as Action for Children's Television and Henry Geller (ACT).[1] These parties argue that the rule no longer serves the public interest or consumer welfare, given that it inhibits competition in the video marketplace and prevents the networks from realizing efficiencies through vertical integration that could benefit both broadcast and cable television as well as consumers. Furthermore, the parties claim that the rule's original rationale -- to prevent the broadcast networks from dominating the video marketplace or from inhibiting the development of the cable television industry -- is no longer valid due to the continued decline of the broadcast networks' audience share and financial base while the cable industry has emerged as a substantial competitive force in producing and distributing video programming. These parties also believe that repealing the cross-ownership rule is necessary in order to ensure the viability of over-the-air broadcasting.

2. NBC observes that the Commission previously concluded that its analysis of changes in the video marketplace, which was included in the 1982 Notice, supported repealing the cross-ownership rule.[2] Furthermore, NBC and CBS note that virtually every government agency or staff that has independently evaluated the rule over the past decade, including the Commission's Network Inquiry Special Staff[3] and Office of Plans and Policy,[4] the Department of Justice,[5] and the National Telecommunications and Information

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[1] A list of parties filing comments in this proceeding is given in Appendix A. DOJ and NTIA submitted late-filed comments that were included in this proceeding's record. Several parties address the merits of the network-cable cross-ownership rule in their comments to the Notice of Inquiry in MM Docket No. 91-221 regarding the changes in the video marketplace. Those comments have been considered and incorporated into this proceeding.

[2] See Notice, at 90.

[3] See Final Report on New Television Networks: Entry Jurisdiction, Ownership, and Regulation, Vol. I at 430-431 (1980).

[4] See K. Gordon, J. Levy and R. Preece, FCC Policy on Cable Ownership, (Staff Report, FCC Office of Plans and Policy), November 17, 1981, pp. 107, 109-110, 124-125. See also Staff Report at 170-171.

[5] See Comments of the Department of Justice, MM Docket No. 82-434, November 29, 1982, at 2.

Administration,[6] has concluded that the rule is outdated and reduces public welfare. CBS continues that since the most recent comments were submitted in 1988, significant changes in the video marketplace have strengthened the case for the rule's repeal, including the continued decline in network audience share and revenues. CBS also notes that the Staff Report found that the rule unnecessarily denies the networks a potential means of reducing costs and increasing revenues. NBC asserts that repealing the rule would serve the public interest by: (1) facilitating the convergence of interests between cable and broadcasting that will benefit both industries; (2) providing broadcast networks additional revenue sources as they respond to declining advertising revenues and audience share; (3) providing resources to continue investment and support of affiliates; and (4) increasing competition in the cable industry which currently is dominated by a handful of MSOs. ABC further contends that the rule no longer serves the Commission's public interest goals of promoting competition and diversity in the video marketplace, adding that it seeks the opportunity to invest in cable systems in order to diversify the company's interests by entering a business in which it has expertise, as well as a venture that is less financially volatile than its broadcast network.[7] ACT also points out that the networks' primarily function through acquiring and distributing television programming, which can now occur through both over-the-air and cable means, and it claims that viewers make no distinction regarding how they receive television programming. Given that the broadcast networks are significantly involved in cable programming, and that their over-the-air operations rely heavily upon vertical integration, the cross-ownership rule precludes integration into the cable sector without a valid rationale.

3. Alternatively, several parties support retaining the rule, including the Network Affiliated Stations Alliance (NASA), the Association of Independent Television Stations (INTV), the National Association of Broadcasters (NAB), the Motion Picture Association of America (MPAA), the Office of the Chief Counsel for Advocacy of the United States Small Business Administration (OCA/SBA)[8], Malrite Communications Group, Inc. (Malrite), and Turner Broadcasting System, Inc. (Turner). These parties believe that the proponents of eliminating the rule have not shown a public interest beyond vague "efficiencies" and opportunities for "portfolio diversification," thus failing to create a basis for changing a rule that was intended to protect First Amendment interests by promoting diversity of media ownership. NASA adds that the networks fail to distinguish between the efficiencies that occur through networks participating as cable programmers, as is currently permitted under the rules, and the

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[6] See Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233, June 1988, at 72, 126.

[7] ABC believes that it could continue to risk the $2-2.5 billion annually in programming expenses that benefit network affiliates if it is permitted to gain access to a more stable cash flow through cable system ownership.

[8] The Office of the Chief Counsel for Advocacy represents the interests of small businesses; although the Chief Counsel is located in the United States Small Business Administration, it operates independently of the Administrator of the SBA.

supposed efficiencies that could flow from owning cable systems. MPAA and CCA/SBA question the extent of the networks' expertise in operating cable systems, asserting instead that any such expertise extends only to producing cable programming.

4. NASA further argues that any efficiencies that might be gained from repealing the rule do not outweigh the dangers of anticompetitive practices implicit in such an action. Supporters of the rule also argue that it remains necessary because the networks still dominate the video marketplace and could exercise their market power to a greater advantage after acquiring local cable systems. Indeed, these parties believe that the networks and large cable MSOs control the outlets for distributing programming in the video marketplace, and assert that network-owned cable systems -- or MSO-owned networks -- would threaten competition and diversity in the video marketplace. For instance, NASA, INTV, and NAB argue that preserving the rule is increasingly important as a constraint on cable's leverage over local affiliates as well as other broadcast stations.[9] These parties express concerns that a network-cable combination could discriminate against competitors of its broadcast or cable interests, or could "bypass" local affiliates in order to distribute programming directly through the cable system, thus creating potential harm for both affiliated and independent television stations. Possible discrimination strategies by network-cable owners are said to include: (1) "bypassing" local affiliates by delivering the network signal directly to local cable systems, (2) carrying local affiliates with an unfavorable channel position in order to favor cable originated programming, or (3) choosing not to carry local affiliates of another network or independent stations, or carrying these stations on a poor channel position in order to favor local affiliates. In addition, these parties question whether network-cable owners will create new competition in the local video marketplace through entry as a second competing cable system because of the excessive risks and expense involved. Instead, they contend that the networks have clearly demonstrated an interest in simply acquiring existing cable systems. They also argue that cable MSOs could seek to acquire broadcast networks in order to control programming, which would increase in value with the growing number of pathways to viewers.

5. CCA/SBA also states that it cannot support the proposed changes until adequate assurances are made that small businesses involved in the industry are not harmed by increased media concentration resulting from common ownership. Specifically, CCA/SBA contends that eliminating the rule may harm independent television stations, small cable operators, wireless cable systems, and program

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[9] NASA adds that the networks' reductions in affiliate compensation support its claim that affiliated stations have lost strength relative to the networks since the rule was adopted. Conversely, the networks respond that reduced network compensation actually demonstrates a loss of network advantage in the video marketplace. See NASA Comments, March 23, 1992, at 8; NAB Comments, March 23, 1992, at 2; INTV Comments, March 23, 1992, at 16.

producers.[10] CCA/SBA believes that concentrating media control in networks and large cable MSOs will complicate efforts by small cable operators to procure programming, because MSOs will have great leverage in negotiating for the transmission rights associated with all of a network's programming after purchasing the network. CCA/SBA also suggests that owners of small cable systems will have to absorb the higher costs of programming and reduced profits, or abandon programming.

6. The three broadcast networks respond to the arguments regarding the potential for anticompetitive behavior by network-owned cable systems, asserting that the fears expressed are logically inconsistent with one another and contrary to rational economic behavior.[11] The networks note that while some parties claim that network-cable owners would injure their own affiliates, others assert that the networks would harm their competitors by expressly favoring their affiliates. Moreover, regarding the possibility that a network-cable owner might restrict its cable service offerings to promote its broadcasting service, the networks argue that their economic self-interest would not cause them to undermine the value of their cable franchises, particularly after making a significant capital investment. Similarly, the networks contend that this economic self-interest will cause them to treat non-affiliated stations fairly and ensure the continued carriage of local broadcast stations on network-owned cable systems, given that these stations are the principal components of the basic service package for most systems. NCTA finds no basis for presuming that network-owned cable systems will unfairly discriminate against broadcast stations, particularly given the lack of evidence that vertically-owned cable operators presently practice anticompetitive behavior or that a network-owned system would do so in the future. NCTA finds that most cable systems currently provide a full range of local broadcast stations to subscribers despite the lack of a rule requiring them to do so, and suggests that the Commission and courts could redress specific grievances.

7. ABC also questions the credibility of fears that suggest a network-cable owner might bypass its affiliates in order to distribute programming directly to its cable systems. ABC notes that a network's ability to reach 99% of the national audience through its broadcast station affiliates is a fundamental part of the network system. By comparison, cable television offers a network considerably less potential coverage than the affiliates' reach due to lower penetration as well as the network's inability to obtain assured access by acquiring all the cable systems in a market. Moreover, to the extent that "bypassing" could occur, ABC believes that it is not related to network ownership of cable systems because networks are currently free to

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[10] CCA/SBA states that the possible adverse effects of discrimination against non-affiliated independent stations with respect to cable carriage were not adequately addressed in the initial regulatory flexibility analysis set forth in the Second FNPRM.

[11] See Comments of Capital Cities/ABC, Inc. (ABC), March 23, 1992, at 8; See also Comments of CBS Inc. (CBS), March 20, 1992, at 13; See also Comments of National Broadcasting Co. (NBC), March 23, 1992, at 23.

contract with cable systems for direct distribution of programming. However, the fact that no network has pursued this option reveals that the strategy is not economically profitable. NASA objects to ABC's portrayal of the networks' interests, claiming that (1) Fox Broadcasting's success demonstrates that universal reach is less important than in the past, and (2) the networks could pursue marginal adjustments in selected markets that would not significantly threaten the extent of their reach.

8. The networks also dispute arguments that the cross-ownership rule is necessary to prevent undue concentration in the video marketplace. They contend that the unfounded concerns raised in this proceeding do not warrant applying an ownership restriction only to network-owned cable companies rather than other potential cable owners. ABC claims that generally applicable limits on MSO size could remedy problems of horizontal concentration in the cable industry, whereas the cross-ownership rule is too severe for addressing potential anticompetitive consequences from particular MSO-network combinations. In addition, ABC notes that any proposed MSO-network merger is subject to the Commission's approval as well as antitrust scrutiny. ABC also argues that if vertical integration confers advantages on cable programmers, there is no reason to deny such advantages to the broadcast networks who compete with them for audiences and revenues.

B. Comments on Restrictions

9. In the Second FNPRM, we also sought comment on a variety of alternative proposals that could alleviate concerns raised in this proceeding, including options that would allow networks to own cable systems (i) in "large" or "competitive" markets, including where second competitive cable systems exist, (ii) up to a national subscriber limit, or (iii) subject to must carry and discrimination requirements. In addition, the Commission invited parties to propose any other alternative restrictions or modifications to the rule that they considered appropriate.

General Comments on Restrictions

10. Several parties, including NASA, INTV, NAB,[12] and MPAA, offer general support for adopting restrictions as a second-best option to retaining the rule, and recommend various measures discussed below. By comparison, ABC believes that none of the concerns raised by proponents of the cross-ownership ban justify retaining the rule, but it does not oppose certain restrictions against potential abuses discussed below. However, ABC states that various measures proposed by parties seeking to retain the rule are designed to protect against feared network conduct that ABC has no incentive to pursue.[13] CATA

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[12] NAB's comments include relevant portions of its comments responding to the Commission's video marketplace Notice of Inquiry, MM Docket No. 91-221.

[13] Chris-Craft/United Group (Chris-Craft) as well as the National Association for the Advancement of Colored People and the League of United Latin American Citizens (NAACP/LULAC) agree that repealing the cross-ownership rule will promote competitiveness for broadcasters, although the

opposes the proposed restrictions and argues that imposing conditions upon network ownership of cable systems would create a disincentive for entry while inhibiting a network's ability to compete with other owners. CATA observes that even if restrictions are not adopted at this time, the Commission could impose restrictions in the future should they prove necessary. NCTA also opposes the proposed restrictions, arguing that they would harm cable operators, programmers and subscribers despite a lack of evidence that network-owned cable systems will actually pursue anticompetitive strategies; it further asserts that the Commission and courts have ample means to redress grievances in particular cases.

Comments on Restrictions Proposed in the Second Further Notice

11. "Large" or "competitive" markets, or where second competitive cable systems exist. NASA argues that the most effective safeguard would permit networks to have ownership interests in cable systems subject to a competing cable system or multichannel video provider. Similarly, the Competitive Cable Association (CCA)[14] supports modifying the rule to allow network entry under conditions that will encourage maximum competition with MSOs, and recommends a single requirement that network-owned cable systems must provide actual or proposed competition for an incumbent cable system or another multichannel video provider. Although CCA does not question the concerns raised regarding the economic health of the networks, it believes that such a modified rule would promote a competitive marketplace for cable service and effectively solve issues of mandatory signal carriage and discrimination. CCA also urges the Commission to encourage joint ventures among networks in owning and operating such cable facilities because of the difficulty of obtaining financing for plant investment.[15] Conversely, ABC opposes any limits on network-cable ownership based on a local market's size or degree of competition, contending that networks are unlikely to harm local diversity as cable owners. ABC also observes that the existing cable MSOs are not subject to such restrictions in acquiring additional systems. NCTA agrees that limiting network ownership of cable systems to "large" or "competitive" markets should also require more substantive justifications.

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parties state that eliminating the rule will serve the public interest only if competitive safeguards are adopted. Chris-Craft and Malrite also argue that the Commission should recommend that Congress eliminate the local broadcast station-cable cross ownership rule, although Chris-Craft supports identical safeguards in this context. ABC argues that the restriction should be reevaluated. See Comments of Chris-Craft/United Group, at 10; Comments of Capital Cities/ABC, at 31, n. 68.

[14] CCA is a non-profit trade association whose members include overbuilders, entrepreneurs who wish to operate overbuilds, and municipalities seeking competitive solutions to problems with existing cable operators.

[15] CCA states that the Congress has recognized the desirability of such arrangements in encouraging competition among newspapers (43 U.S.C. § 1801-3).

12. National ownership limits. While seeking to repeal the cross-ownership rule, ABC and NBC do not oppose a national subscriber cap on cable ownership if the Commission determines that some protective measures are necessary. ABC objects to national subscriber limits that would apply only to network companies as proposed by the Commission, but it would not oppose a national subscriber limit established at a level high enough to permit sufficient growth opportunities so that broadcast networks could pursue cable ownership as a viable business strategy. Specifically, ABC proposes a national ownership cap at systems totalling 10% of all cable subscribers, using "attributable interests" calculated according to the broadcast multiple ownership rules.[16] According to ABC, a 10% cap would allow networks to benefit from efficiencies of scope and scale, but should eliminate concerns of horizontal concentration, especially given that the Commission has not to date objected to industry concentration levels substantially higher than 10%.[17] ACT and the Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights and Media Access Project (MAP) also support a 10% national subscriber cap in order to constrain the potential power of MSOs and network cable owners, while MAP also recommends allowing attributable ownership of additional systems that are minority owned. MAP also requests that the Commission define and enforce attributable ownership rules so as to preclude parties from evading the purpose and intent of the limitations.

13. NASA, INTV, and MPAA recommend a national ownership cap of 5%, measured by "homes passed,"[18] "total television homes," and subscribers, respectively. NASA contends that the 5% threshold would ensure that network-cable owners do not gain undue market power nationally while preserving the opportunity for networks to attain ownership interests in all but the two largest and most integrated MSOs, Tele-Communications, Inc. and Time-Warner, Inc. NAACP/LULAC propose a 5% cap on each network's cable subscriber base, with an incentive provision to increase the percentage when a network invests in or helps finance minority controlled cable systems. ABC replies that the 5% national cap suggested by NASA, INTV, and MPAA is harsh and unjustified, particularly given that it is impossible to establish a definitive point beyond which the network cable owner would have undue national market power. ABC does not object to a formula using homes passed as a percentage of total television homes, and thus reiterates its support for a 10% threshold of national cable subscribers or a cap at an equivalent number of subscribers

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16 See 47 C.F.R. § 73.3555.

17 See ABC citing 1990 Cable Report to Congress, at paragraph 127; Comments of Capital Cities/ABC, Inc., at 36.

18 NASA suggests that the Commission adopt a "homes passed" measure because it is more directly analogous to the "audience reach" of broadcast limits, particularly over longer periods of time, than the current number of cable subscribers. NASA Comments, at 21, n. 11.

based upon homes passed as a percentage of total TV homes.[19] ABC states that it would also support provisions similar to those presented by MAP or NAACP/LULAC that would permit a network to exceed the national cap as a partner with a minority-controlled owner in order to expand ownership opportunities and promote diversity. NCTA, in turn, believes that the proposed national subscriber limit on network ownership of cable systems lacks a sufficient rationale.

14. Must carry and channel positioning requirements. Several parties address the proposed option of implementing must carry rules and channel positioning requirements. Indeed, NASA recommends a package of behavioral constraints for network-cable combinations including must carry, channel positioning, "bypass protection," and preserving the current network affiliate rules. NASA specifically supports the must carry provisions that are part of the Cable Television and Consumer Protection Act of 1992 as passed by the Senate, which NASA believes will protect local stations without unduly burdening cable systems.[20] In addition, NASA believes that the provisions in S. 12 are narrowly tailored and that the bill's legislative history establishes a relationship between cable compulsory license and must carry, such that S. 12 should satisfy constitutional tests even though it applies broadly to all cable systems. ABC reiterates that a network would not degrade a cable franchise after making a significant capital investment, but it believes that the Commission could craft a rule that would require the network-cable owner to carry local broadcast stations, subject to the system's capacity limits, and to afford reasonable channel position protection. For instance, ABC notes that it would not object to must carry and channel position requirements similar to those included in S. 12. In order to preserve the viability of all broadcasters, Chris-Craft believes that any over-the-air television station licensed to a community located within the same television market as a co-owned cable system should be entitled to mandatory carriage, channel position protection, and equal access to transmission quality enhancements. MPAA also supports reasonable must carry and channel positioning requirements, as well as anti-discrimination protection for independently owned networks and network affiliated stations. MAP urges the Commission to adopt restrictions, including mandatory carriage and bypassing protection; Malrite doubts the constitutionality of must carry measures and contends that it is unnecessary for the Commission to consider must carry or channel position protection limited to network-cable owners while Congress is deliberating legislation on these issues for the industry as a whole.

15. CCA/SBA contends that it cannot support the proposed changes to the rule unless the Commission can develop a constitutionally acceptable must carry provision, which CCA/SBA considers doubtful if not impossible. CCA/SBA

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[19] ABC estimates a universe of 92 million television homes nationwide, with 55 million cable homes, yielding 5.5 million cable subscribers for its suggested 10% national limit. ABC Reply Comments, at 11.

[20] See Cable Television and Consumer Protection Act of 1992, Senate Bill 12 (S. 12.), Section 16, January 20, 1992.

claims that since "must carry" rules were vacated by the D.C. Circuit[21], numerous cable operators have deleted carriage of some local broadcast stations. Accordingly, given the possibility that other network-owned cable systems could retaliate against any decisions to deny carriage, CCA/SBA suggests that the most likely abuse could occur if network-cable owners delete signals for all non-affiliated local stations, or limit local broadcast signals to the three network affiliates. Without access to cable transmission, CCA/SBA argues that independent stations on the UHF band will have inferior picture quality, which may cause reduced viewership and advertising revenue, such that independent stations may go dark. Furthermore, without advertising opportunities on independent stations, small businesses could face a choice of paying higher rates to advertise on affiliated stations or forgoing TV advertising, thereby creating a competitive disadvantage with respect to larger competitors with greater resources.

16. Regarding must carry or anti-discrimination requirements, NCTA believes that forcing network-owned cable systems to give preferential or protected status to broadcasters would interfere with, rather than promote, diversity and competition in the video marketplace. In its reply comments, NCTA asserts that these particular restrictions would harm non-broadcast media and insulate broadcasters from competition for reasons that are unrelated to the competitive superiority of broadcast stations. TBS also asserts that the First Amendment protects expression by cable programmers and precludes changes to the rule that impose mandatory carriage requirements -- which would subordinate the rights of cable programmers to the rights of broadcasters by foreclosing access to the public -- on cable systems owned by a television network. Likewise, TBS objects to must carry rules that incorporate channel positioning requirements because they guarantee preferential channel positions for broadcasters at the expense of cable programmers.[22]

Comments Regarding Additional Restrictions

17. Several parties also recommend adopting additional restrictions beyond those proposed in the Second FNPRM should the Commission decide to permit network entry into cable. For example, if the Commission declines to adopt NASA's recommended safeguard that would permit networks ownership of cable systems subject to a competing cable system or multichannel video provider, it claims that other safeguards are necessary. Specifically, in addition to the national ownership limits and must carry/channel position requirements, NASA recommends: (1) local ownership limits established at 25% of homes passed in an ADI market, (2) further behavioral constraints to

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21 See Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir.) clarified, 837 F.2d 517 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 2014 (1988); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986).

22 CATA states that the Commission will have difficulty justifying proposed conditions for network ownership because broadcasters and cable operators have been unsuccessful in their prior attempts to offer a constitutionally acceptable rationale.

include bypass protection and preserving the network affiliation rules, (3) applying cable-telephone attribution standards, and (4) revisiting the entire cross-ownership issue in the event that any safeguard is judicially invalidated.

18. Local ownership limits. NASA claims that a network-cable owner's market power would derive largely from the cable system's local monopoly power. NASA continues that a cable system's coverage in a television station's local market is positively related to its power over local stations, thus causing the possibility of capricious carriage or channel positioning decisions to increase as the cable operator encompasses a greater portion of that local market. Therefore, the affiliates argue that the Commission must limit the portion of homes that a cable-network combination can pass in a given ADI, particularly because behavioral constraints -- that NASA also considers necessary -- are cumbersome, difficult to enforce, and should not become the primary means of preventing network-cable abuses. NASA also claims that a local cap set at 25% of homes passed would preclude a cable-network combination from totally dominating a given market while permitting substantial penetration and operating efficiencies.[23] By comparison, MAP suggests prohibiting network ownership of cable systems whose subscribers are the greater of (a) 50% of an ADI's households, or (b) an industry-wide average penetration for a similarly sized market. ABC specifically criticizes local ownership caps, which it claims would serve no purpose if anti-bypass and must carry/channel position were in place. ABC argues that local broadcast stations are no more vulnerable to abuse when a network owns the local cable system than under another owner, given that any cable owner's self-interest will mitigate against anticompetitive conduct. Moreover, even if the notion of cable's local market power as presented by NASA and INTV are accepted as true, ABC argues that the rationale does not justify subjecting networks to local ownership limits that are not similarly applied to all potential cable owners.

19. Bypass protection. NASA believes that must carry and channel positioning protection may provide some deterrent to network-cable abuse in the near future if combined with local ownership limits. However, the affiliates argue that improvements in cable's channel capacity and technical capabilities, as well as changes in programming lineup, could enable network-cable owners to vitiate must carry and channel positioning protections and provide economic incentives to discontinue affiliations with local stations. Therefore, NASA requests that the Commission adopt requirements that a network-cable combination: (1) must affiliate with at least one station licensed in each ADI where it owns a cable system; and (2) must not discriminate against local broadcast stations in favor of co-owned cable systems in making off-network syndicated programming available. ABC states that it does not oppose a safeguard for bypass protection and recommends requiring a network to maintain affiliation with a broadcast station in any

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[23] Malrite also proposes a 25% local ownership limit.

ADI market in which it has an ownership interest in a cable system, provided that it has previously affiliated with a station in that market.[24]

20. Additional Behavioral Requirements. INTV proposes measures similar to NASA's suggested safeguards for local ownership limits and bypass protection, and adds requirements that network-owned cable systems: (1) must not condition syndicated exclusivity protection on a station's forgoing its channel position or carriage rights; (2) must not retaliate against any station that complains to the FCC about alleged violations of safeguards or ownership limits; (3) must compensate local stations for carriage at a rate at least as favorable as that paid by cable systems that are not owned by networks, if retransmission consent requirements are adopted or if the compulsory license is repealed; and (4) must not be permitted in markets where the network owns a broadcast station.[25] INTV also suggests that the rules should not preempt any antitrust laws and should remain in place for ten years. Similarly, MAP adds suggestions that the Commission: (1) retain the current financial interest and syndication rules as well as the prime time access rules; (2) retain the 12 station/25% audience reach limit on a network's TV station ownership; and (3) repeal the rules allowing network-cable cross-ownership if judicial action invalidates any of these safeguards. MAP not only requests that the Commission adopt these measures, but also states that the several structural and behavioral safeguards that they advocate are necessary conditions for permitting meaningful competition to the vertically integrated cable MSOs without threatening the broadcast television service.

21. ABC strongly opposes the behavioral safeguards that are advocated by NASA and INTV in addition to must carry rules, bypass and channel positioning protection, and reiterates that the concerns of possible network abuses raised in this proceeding are not consistent with a network's economic interests. On the contrary, ABC states that a network would have a powerful incentive to treat affiliated and non-affiliated stations favorably in its role as a cable owner. ABC also claims that NASA overstates the argument of a network's market power over its affiliates, given that these relationships are determined more directly by the dynamics and power balances within each market. For instance, ABC observes that a station that generates greater viewership than other local stations is likely to possess bargaining power in negotiations with a network. Also, given a combination of must carry rules, channel positioning requirements and bypass protection, ABC suggests that local affiliates would have a stronger position as a result of modifying the rule. ABC also contends that the additional behavioral safeguards proposed by NASA and INTV are either implicit within must carry and bypass protection, or -- by requiring the Commission to supervise daily operations of the broadcast networks -- entirely

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[24] According to ABC, terms of affiliation would include those customarily associated with a primary affiliation agreement, including "first call" on all network television programs that are scheduled for broadcast in the community to which the station is licensed, and network non-duplication protection. ABC Comment, at 34.

[25] NAB and NAACP/LULAC also recommend retaining the local broadcast station-cable cross-ownership rule.

unenforceable. In addition, ABC asserts that the safeguards suggested by NASA and INTV make network entry into cable ownership too cumbersome and difficult for the venture to become a viable business option.

APPENDIX C

Final Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

Need for and purpose of this action.

This action is taken in response to questions regarding the continued validity of the network-cable cross-ownership ban in the midst of continuing fundamental changes and increased competition with the video marketplace. This Report and Order relaxes the rule to permit broadcast television networks to own cable systems, provided that such combinations do not exceed (i) 10% of homes passed by cable nationwide, and (ii) 50% of homes passed by cable within an ADI. We will not apply the local limit to instances where the network-owned cable system faces a "competing" system. We will also consider complaints from local broadcast stations that claim to have experienced competitive harm by a network-owned cable system with respect to non-carriage or channel repositioning. Where we find that anticompetitive conduct has occurred, we will take remedial action, including ordering the cable operator to carry the station, or to carry it on a given channel, as necessary. In three years, we will review the continued necessity of retaining these restrictions on the broadcast networks' participation in the cable industry, given that the measures may prove unwarranted after a period of transition and further change in the video marketplace. Network ownership of cable systems in defined circumstances will serve the public interest by promoting healthier, more diversified network operations and increased competition to incumbent cable systems, and the limited structural restrictions will alleviate concerns of possible anticompetitive conduct by network-cable combinations.

Summary of issues raised by comments in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.

A. Issues raised. CCA/SBA states that the initial regulatory flexibility analysis did not uncover the significant potential harm that the proposed changes to the rule could impose on independent television stations and small businesses that advertise on them, small cable operators, wireless cable systems, and program producers.

B. Assessment. This Report and Order recognizes concerns raised by parties seeking to retain the cross-ownership rule, which claim that network-cable operators could use enhanced leverage to harm local broadcast stations through various discriminatory practices. The Commission concludes that the concerns regarding such possible practices are not sufficient to retain the rule, but, out of an abundance of caution, believes that some measured structural restrictions and complaint procedures are warranted to alleviate the potential harm to competition and diversity in the video marketplace.

C. Changes made as a result of such comments. The Commission modifies the cross-ownership rule to permit networks to own cable systems, provided that such combinations do not exceed the national and local standards for homes passed. The local limit will not apply to instances where the network-owned cable system faces a "competing" system. We are convinced that any lingering concerns regarding competition and diversity in the video marketplace are best addressed through these measured structural constraints, which are readily applied and enforced. Moreover, we believe that these measures will mitigate the need for adopting broad behavioral measures to prevent potential abuses by network-cable owners because their incentives to pursue discriminatory practices would be greatly reduced. Nonetheless, in the event that such practices should occur, we will consider complaints from local broadcast stations that claim to have experienced competitive harm by a network-owned cable system with respect to non-carriage or channel repositioning. Where we find that anticompetitive conduct has occurred, we will take remedial action, including ordering the cable operator to carry the station, or to carry it on a given channel, as necessary.

Significant alternatives considered and rejected.

The Commission considered all the alternatives presented in the Second FNPRM and considered all the comments directed to the various issues in the Second FNPRM. Alternatives proposed by commenters that were less burdensome on network-cable operators, and which would not detract from the Commission's goal of ensuring that quality service is provided to the public, were adopted.

APPENDIX D

Rules

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The Authority Citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 303.

2. Section 76.7 is amended by adding a new sentence to the end of paragraph (e) to read as follows:

§ 76.7 Special Relief

* * * * *

(e) * * * * * With respect to petitions filed relating to discontinuance of carriage of a broadcast signal, or repositioning a signal to another channel, by parties subject to §76.501(b)(1) of the rules, comments or opposition filings shall be due within fifteen (15) days and replies thereto within seven (7) days.

* * * * *

3. A new Section 76.63 is added to read as follows:

§ 76.63 Notification.

Where the signal of a local television broadcast station, as described in Section 76.5(gg)(1-3) of this part, is carried by a cable television system that is subject to the provisions of Section 76.501(b)(1) of this part, the operator of such cable system shall provide written notice to the licensee of a local television station at least 30 days prior to either discontinuing carriage of the station's broadcast signal or carrying that signal on a different cable channel.

4. Section 76.501 is amended by revising paragraph (a), redesignating paragraph (b) as (c) and revising it, and adding new paragraph (b) to read as follows:

§ 76.501 Cross-ownership.

(a) No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of Part 73 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

(b)(1) A cable television system (including all parties under common control) may directly or indirectly own, operate, control, or have an interest in a national television network (such as ABC, CBS, or NBC) only if such a system does not pass more than (i) 10 percent of homes passed on a nationwide basis when aggregated with all other cable systems in which the network holds such a cognizable interest, and (ii) 50 percent of homes passed within any one ADI, except that a cable television system facing a competing system will not be counted toward this 50-percent limit.

(2) The requirements of paragraph (b)(1) are applied at the acquisition date, except that a party with no prior attributable interests in a broadcast network or cable systems may exceed these limits in connection with a purchase of these operations from a party with such existing network-cable interests. Paragraph (b) will not be applied so as to require divestiture of existing facilities.

(3) For purposes of paragraph (b) of this section:

(i) "Homes passed" is defined as the number of homes to which cable service is currently available whether or not a given household subscribes to the service.
(ii) "ADI" is defined as the Arbitron Area of Dominant Influence.
(iii) A "competing system" is faced by a network-owned cable system where the cable system provides service in the same area as another independently owned, multichannel video delivery system, as specified in Section 76.33(a)(2)(ii) of the rules. In order to be counted, such multichannel competitor must be capable of providing a package of local broadcast signals integrated within the service.

* * * * *

(c) Effective date. The provisions of paragraph (a) of this section are not effective until November 8, 1987, as to ownership interests proscribed herein if such interests were in existence on or before July 1, 1970, (e.g., if franchise were in existence on or before July 1970), and will be applied to cause divestiture as to ownership interests proscribed herein only where the cable system is directly or indirectly, owned, operated, controlled by, or has an interest in a non-satellite television broadcast station which places a principal community contour encompassing the entire community and there is no other commercial non-satellite television broadcast station placing a principal community contour encompassing the entire community.

* * * * *

Separate Statement of Commissioner James H. Quello, dissenting in part.

In the Matter of Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks.

I generally support the entry of national broadcast networks into the field of cable television because of the vast changes that have occurred in the media marketplace. But I believe this significant change must be accompanied by appropriate safeguards. As I noted when the Commission adopted the *Second Further Notice of Proposed Rulemaking* in this proceeding, "the question of cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper."1 Accordingly, my guiding principle for evaluating possible changes in the network-cable rules is "the probable effect of such action on the maintenance of free over-the-air television."2

With this goal in mind, I have no quarrel with the decision to relax the network-cable cross-ownership restrictions. But I am concerned about the sufficiency of the purported safeguards to prevent possible anticompetitive abuses. In particular, I would have preferred to see the local cap set at a 25 percent audience reach, but will concur with the more liberal limit.

In the absence of more stringent structural regulations, however, it is vital that the Commission be certain that its behavioral safeguards will work. Unfortunately, this part of the *Report and Order* is the weakest — and is the portion with which I must dissent. Rather than adopt must carry requirements, as was proposed in the *Second Further Notice*, the Commission adopted a complaint procedure that in internal debates came to be known as "negative must carry." This policy choice at least has the virtue of being truth in advertising — negative must carry literally means "no must carry." But I doubt it will offer much protection.

Background: The Need For Must Carry

On numerous occasions I have advocated the need to impose must carry requirements on cable operators, who have the ability to control access by government-licensed television stations to a substantial portion of their audience. The need is even more compelling when networks are allowed to own cable systems, since this will give them control over the transmissions of their most direct competitors — other over-the-air broadcasters.

The Commission's half-hearted approach to must carry safeguards in this *Order* is explained by its conclusion that networks would lack a clear incentive to discriminate against other broadcasters. Indeed, the majority's minimalist approach to behavioral safeguards is based on the belief that "anticompetitive action by a network-cable entity against local broadcast television stations would undermine the value of the network's cable system." *Report and Order* at ¶ 23. But why would dropping an over-the-air channel damage a cable system that is likely to have no multichannel competitors? Does the majority really believe that subscribers will drop their cable hookups out of solidarity with the disfavored broadcasters, thus guaranteeing that they receive all signals off the air? Will people so readily give up their MTV and CNN? I doubt it.

In contrast, the incentive for a network-owned cable system to manipulate the carriage and channel positioning of its broadcast competitors seems to be strong. The reason for this is obvious: broadcast networks are advertiser-supported media that compete directly against one another.3 Small changes in the ratings translate into millions of dollars in revenue. During the course of a single season, each prime time ratings point equates to $100 million in advertising revenue.4 Selective manipulation of carriage or positioning by network-owned cable systems in a sufficient number of markets could affect the attractiveness of competing network programming. To have this effect, it may not be necessary to go to the extreme of dropping a network affiliate although there is no reason why it could not do so.5

While the Commission has been content to study the issue of must carry rules from time to time, it has declined to act on the information submitted to it. Ironically, policymakers outside the Commission have understood much more clearly the implications of our years of study and indecision. Citing an FCC staff survey as well as "[c]omments filed at the FCC," the House Energy and Commerce Committee Report ("House Report") on H.R. 4850, the Cable Television Consumer Protection and

Competition Act of 1992, recited overwhelming evidence of the consequences of a lack of must carry protection.6

It is astonishing that the Commission would wait for others to draw the inescapable conclusions contained in the information so readily at hand. The most comprehensive analysis of this issue was undertaken by the Policy and Rules Division of the Mass Media Bureau in 1988. The resulting report disclosed that:

— Of the 4,303 cable systems that voluntarily disclosed data to the Commission, 869 systems admitted denying carriage to 704 television stations in 1,820 instances;

— 241 cable systems reported denying carriage to three or more local stations; 113 admitted denying carriage to four or more local stations;

— Cable systems dropped carriage of more than 100 local public stations;7

The Committee extrapolated from the staff findings and concluded that "in the year following the *Century* decision, there may have been as many as 3,640 instances of non-carriage."8 Thus, simply by examining information already compiled by the Commission, the Committee found "a grave threat to the allocation system favoring local service established by Congress and the FCC."9

Noncarriage decisions made by cable operators undermine the allotment system because stations that are dropped "effectively will cease to exist."10 The Committee found "concrete and demonstrable evidence of the harm suffered by local broadcasters when they are not carried by, or are repositioned on, their local cable systems."11 Such actions resulted in "forced reductions in local news, public affairs, and other public interest programs, the inability of new stations to obtain financing to commence operations, and bankruptcy for existing stations."12 When local stations are harmed in this way, it is not just a regulatory construction — the allotment system — that suffers. The ultimate losers are the American people, since "[l]ocal television stations . . . are both the leading source of news and public affairs information for a majority of Americans and the most popular entertainment medium."13

Our experience has been that these problems cannot be solved through half-measures, such as A/B switches. Four years after the Commission began mandatory public education for cable subscribers, less than 12 percent of subscribers were connected to an A/B switch and an outside antenna.14 This experience led the House Committee to conclude that A/B switches "are cumbersome, often ineffective, troublesome to install and operate, and are unacceptable to consumers."15

Where, as here, there is no effective alternative to cable carriage, the Commission should seek to minimize the incentive to drop signals or consider real safeguards. But as the Committee found, "the incentives for cable systems to drop, refuse to carry, and reposition may increase" as "competition for programming, viewers, and advertising dollars increases." House Report at 53. Ownership of cable systems by networks will only heighten this incentive, as I noted above.

Consequently, the Commission should have focused on meaningful must carry safeguards. The "negative must carry" option hardly qualifies as meaningful, as I will describe below. And the Commission cannot assert that it had no obligation to act because Congress is adopting comprehensive must carry protection as part of cable reregulation.16 First, the legislation has not yet become law. Indeed, the House had not yet voted when the Commission acted in this proceeding. Second, we do not yet know what provisions will be included when the bill emerges from conference, or if the President will sign the legislation. Third, we do not know how the very broad must carry rules will fare in court.17 And finally, if anyone at the Commission seriously was anticipating a congressional solution, there would have been no reason to adopt "negative" must carry.

So in the end, the Commission must live up to its independent responsibility to ensure that its policy choices serve the public interest and do not lead to unintended harms. In this proceeding, the Commission acknowledged the potential harm by adopting a watered-down safeguard, but neglected to fully analyze whether this approach would be effective. I dissent from this omission.

Constitutionality of Must Carry Rules

Opponents of must carry rules uncritically point to the D.C. Circuit decisions in *Quincy Cable TV, Inc. v. FCC* and *Century Communications Corp. v. FCC* as proof that must carry rules would be unconstitutional. Naturally, there was some internal debate about the implications of these decisions on any must carry rules that might have been adopted in this proceeding. The constitutional issue did not appear to be the deciding factor, however, since both *Quincy* and *Century Communications* are emphatically narrow holdings.

For example, the *Quincy* court repeatedly emphasized that it was not concluding that must carry rules are *per se* unconstitutional, and stated:

> We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat. Should the Commission move beyond its 'more or less intuitive model,' as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment.[18]

Similarly, the court in *Century Communications* noted that "[w]e do not suggest that must-carry rules are *per se* unconstitutional, and we certainly do not intimate that the FCC may not regulate the cable industry so as to advance substantial governmental interests."[19] In both cases, the court said that the Commission "failed to 'put itself in a position to know' whether the problem its regulations seek to solve 'is a real or fanciful threat.'"[20] The Court in *Century Communications* noted that the Commission was obligated "to adduce either empirical support *or at least sound reasoning* on behalf of its measures," and had failed to do so.[21] As explained below, these concerns would be unlikely to undermine proposed must carry rules in this proceeding.

Must carry opponents' reading of *Quincy* and *Century Communications* implies that almost no regulation relating to local programming on cable systems would survive First Amendment scrutiny. But this analysis overlooks subsequent cases that address this issue. For example, in *Chicago Cable Communications, Inc. v. Chicago Cable Commission*, the U.S. Court of Appeals for the Seventh Circuit upheld the constitutionality of local programming origination requirements.[22] In that case, the court found that "[e]ncouragement of 'localism' certainly qualifies as an important or substantial interest," and agreed with the franchising authority that programming requirements "serve the interest of preserving free, locally oriented television."[23]

With respect to the narrowness of the rules, the court pointed out that under *O'Brien*, the means employed "must be narrowly tailored but not necessarily the least restrictive alternative."[24] Thus, the court held that incidental restrictions on speech are permissible "[s]o long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation."[25] In short, courts have not hesitated to uphold analogous regulations in an appropriate case.

To understand the holdings in *Quincy* and *Century Communications*, it is necessary to review the context in which each of those decisions was reached. *Quincy* was decided in 1985, during what the court called a "wide-ranging deregulatory effort."[26] Several years earlier, the Commission had issued an *Economic Inquiry Report* that assessed the economic relationship between the cable and television industries. That *Report*, which the Commission said enabled it to speak "with a clarity[] which is uncommon in matters of public policy," led to various regulatory changes, including deletion of syndicated exclusivity and distant signal carriage rules. These measures were predicated on the Report's conclusions that "competition from cable television does not pose a significant threat to conventional television," that there would be a "fairly steady growth in the demand for advertising," and that "the ability of stations to maintain existing levels of service to their communities is likely to be unimpaired in the absence of . . . distant signal carriage rules."[27]

For the court in *Quincy*, the dissonance between the Commission's stated rationale for must carry and its other deregulatory initiatives was too great. In the two decades since the rules were adopted, the Commission had not attempted to gather evidence in their support, had reached contrary conclusions in a comprehensive economic report and had eliminated analogous rules. In

that situation, the court properly concluded that the Commission did not demonstrate a substantial governmental interest, and quite possibly had repudiated the economic theory underlying the rules.28

Century Communications presents a less serious case, since it is doubtful that the Commission genuinely intended to demonstrate a substantial governmental interest. The court found that the Commission had failed to support its conclusion that interim must carry rules were necessary to enable consumers to become accustomed to A/B switches.29 Among other things, the court found no evidence to support the Commission's assumptions regarding consumer response to A/B switches, and, in fact, pointed to contrary evidence in the record.30 Since then, however, it has been demonstrated that very few cable subscribers have an outdoor antenna and an A/B switch.

Fast forward to 1992. The Commission has reinstated syndex rules and that decision withstood First Amendment challenge. In June the Commission released a *Notice of Proposed Rulemaking* on the future of our television rules. The thrust of the *Notice* was to reduce regulatory burdens to help broadcasters "adapt to the multichannel video marketplace." The *Notice* found that that "[p]rofits of broadcast television stations . . . have declined steadily in recent years" and that outside the major markets, "losses apparently have become the norm."31 A principal catalyst for the Commission's inquiry was the Office of Plans and Policy Report, which found that many television stations, particularly in small markets, will find it hard to compete in a multichannel environment, and many will go dark.32

In short, the factual predicates of the 1979 *Economic Inquiry Report* and the 1985 *Quincy* decision are no longer relevant to the must carry debate. Given these changes, and assuming the Commission for the first time articulates a coherent regulatory rationale based on public interest principles, the courts would have little trouble upholding a must carry requirement in this proceeding.

As a necessary safeguard to prevent network-owned cable systems from discriminating against competing over-the-air broadcasters, must carry rules are narrowly tailored because they identify the problem to be corrected (the threat of anticompetitive conduct) and are designed precisely to address that abuse. The cases support this conclusion. In *Quincy*, for example, the court did not conclude that it necessarily would be overly broad to require a cable system to carry all local broadcast signals. In fact, the court noted that "it is for the Commission and not this court to ascertain which broadcasters or classes of broadcasters are sufficiently at risk to warrant protection" and "[i]t may well be that in some circumstances, requiring carriage of the 18th broadcast station is consistent with the objective of preserving free, community-oriented television."33 The problem in *Quincy* was that the Commission failed "to draw any lines at all" that would permit the court to assess the fit between regulatory means and ends. That is not the case in this proceeding.

In short, *Quincy* and *Century Communications* presented no obstacle to adopting must carry rules in this proceeding. But unfortunately it did not happen. If the majority had hoped to sidestep the constitutional issue by opting for negative must carry, it miscalculated. The issue will be presented in full force the first time the Commission "order[s] the cable operator to restore the carriage or channel position of the local station" under its chosen safeguard.34

So in the end, nothing was gained by thwarting true must carry protection. Was anything lost? Consider the majority's solution:

The Empty Promise of Negative Must Carry

The procedure outlined in the *Report and Order* pledges to "entertain complaints from local television stations alleging harm as a result of anticompetitive conduct by a network-owned cable system with respect to non-carriage or channel positioning." *Report and Order* at ¶ 23. The choice of words here — "entertain complaints" — is ironically appropriate, for the Commission truly has created a dog and pony show in the procedure. "Entertain" the complaints really is all the Commission can promise, since the requirements for bringing a successful carriage claim appear all but impossible to meet.

Network-owned cable operators initially must provide 30 days' notice to any local broadcaster that it plans to drop or reposition. The majority "expect[s] . . . the parties will utilize this 30-day period to reach a mutually agreeable resolution prior to the scheduled date for noncarriage or repositioning." *Id.* at ¶ 24. But this talk of reaching "mutually agreeable"

solutions is nothing but a Washington euphemism that means "arranging a payoff," which, of course, is part of the problem. As the House Committee found, "refusal to carry, changing channel positions, *or demanding compensation for carriage* of local broadcast signals are all practices damaging to the public interest and to the policies and purposes of the Communications Act." House Report at 56 (emphasis added).

Those broadcasters unable to come up with sufficient funds to reach a "mutually agreeable resolution" may then seek special relief upon a showing that it "has suffered, or will suffer, competitive harm as a result of being dropped or repositioned. *Report and Order* at ¶ 25. But how is this to be proven?

The lack of seriousness with which the Commission evidently approached this safeguard is demonstrated by the elements of proof needed to bring a successful complaint. A *prima facie* case requires "factual evidence showing that the station *has lost* access to a significant part of its audience as a result of the cable operator's adverse action." *Id.* at ¶ 26 (emphasis added). So while the Commission promises prospective relief from anticompetitive conduct, the pleading requirements foreclose any such possibility.[35]

Additionally, the procedure requires the complainant to engage in mind reading, and to prove the evil intent of the cable operator. That is, the broadcaster must prove that the operator's decision to cease or modify carriage was motivated by competitive malice, and not by "legitimate efforts to serve the needs and interests of its subscribers." *Id.* Presumably, even if a broadcaster can find some way to demonstrate bad intent, the operator need only show that the replacement channel provides programming to subscribers that was unavailable on the dropped local signal.

Finally, even if the obstacles to a successful complaint were not so formidable, time works against the broadcaster. It naturally will require some time to assemble the proof that our procedure requires — that the broadcaster has lost a significant part of its audience, and the operator must be given sufficient time to respond as a matter of due process. After the pleading cycle runs its course, the Commission must consider the issue, reach a decision and give the operator sufficient time to comply with whatever order we issue. Thus, even if every stage of the process is handled expeditiously — something for which the Commission is not well known — the damage will have already been done.

In the end, the only relief guaranteed by negative must carry will be to law firms looking for ways to spend their clients' money. It certainly will be no help to broadcasters.

The Problem of Consistency

As noted above, the court previously invalidated must carry rules in large part because the Commission's commitment to the rules was "in sharp contrast to [its] treatment of several other components of the regulatory framework." *Quincy Cable TV, Inc.*, 768 F.2d at 1442. With the decision in this proceeding to forego adopting true must carry protection, one may well wonder if the Commission has a coherent position on the existence of network market power.

In the financial interest and syndication proceeding, a majority of the Commission retained significant restrictions on the ability of networks to enter programming markets and adopted a complex web of new regulations designed to limit perceived network power.[36] Here, however, the Commission appears to be relatively unconcerned with network market power, opting only for the transparently ineffective negative must carry alternative.

So, what is the FCC's position on network market power? I am not suggesting that the networks are run by bad people who are intent on crushing their competitors. At the risk of mixing truisms, I believe simply that power abhors a vacuum. And where networks can combine the ability to control the signals of their over-the-air competitors with the natural incentive to win in the marketplace, the power is likely to be used. Where millions of dollars and executive careers are on the line, the temptation may well become too great not to use it.

Oddly, however, the Commission focused its regulatory authority on the issue of network power in finsyn and not in this proceeding. As I noted earlier in this proceeding:

> This is unlike the situation in the financial interest and syndication proceeding where . . . changes in the media marketplace create a presumption in favor of repeal. That proceeding involved national and international markets for programming in which there are many alternative buyers.

> By sharp contrast, the question of [network-cable] cross-ownership affects local video markets, in which the cable operator has the potential to act as a bottleneck or gatekeeper. The 1990 Cable Report found that local cable operators have the *ability* to engage in anticompetitive practices; the question now facing the Commission is whether allowing cross-ownership will create an added *incentive* for them to do so.[37]

From my perspective, the Commission expressed its concern over possible network market power in the wrong proceeding. But from any perspective, the Commission must be able to explain its decision to restrain network power in the first case and not in the second.

As in *Quincy*, the courts may be less willing to listen to the Commission's explanations where there is no coherent regulatory philosophy supporting the policy choices. As the D.C. Circuit noted in another case, "an agency's entitlement to deference depends upon the quality of its determinations. Factors to be considered include 'the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.'"[38]

Until the Commission can figure out whether it is concerned about network power, or not — and can provide a cogent explanation of why it is concerned in one case but not another — there is no reason for reviewing courts to defer to our judgments on this issue.

Conclusion

I hope that my concern over must carry rules is moot, and that the cable bill and its comprehensive must carry package will become law. But as of the date of our vote in this proceeding, and even as the final text is going to press, we do not yet know the outcome.

To the extent the Commission sought to address the must carry issue, I would have preferred that it do so directly by making the best case possible in support of the rules. The case is there to be made. But the Commission instead opted to water down the rules in an apparent effort to conform to the limited showings we have made in the past. Accordingly, I dissent from that aspect of the decision.

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[1] *Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 586, 594 (1991) (Concurring Statement of James H. Quello).

[2] *Id.*

[3] The Commission should be alert to the fact that MSOs have exercised their market power when threatened with direct competition between cable networks. For example, CNBC was forced to change its format so as not to compete with CNN in order to obtain carriage commitments. *See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, 5028 (1990). In the case of broadcast networks, such direct competition is a fact of life.

[4] *In the Matter of Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094, 3233 (1991) (Dissenting Statement of Commissioner Quello), citing Comments of CBS, Inc., June 14, 1990 (Appendix A, Affidavit of Jeffrey F. Sagansky). In this respect, networks as cable operators would have an incentive to discriminate that is far more powerful than any facing existing MSOs. Any given cable network garners only a small fraction of the overall audience; it has dozens of competitors, no one of which is likely to have a substantial effect on its success or failure. But broadcast networks have only two or three readily identifiable competitors for their core audience. If a competing over-the-air network can be hobbled, the benefit to the other broadcast networks is likely to be significant.

[5] The cable operator could drop network signals selectively, such as deleting a given program or a particular evening's schedule; it could exile the competing networks to channel Siberia; or it could constantly shift channel positions, such as during "sweeps" periods.

[6] H. REP. 102-628, 102nd Cong. 2d Sess. (June 25, 1992).

[7] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report*, September 1, 1988. Moreover, from 1990-91, at least seven additional public stations (serving more than 263,179 subscribers) were dropped. *See* Comments of America's Public Television Stations in Effective Competition Proceeding, February 14, 1991 at 10 n.21.

[8] House Report at 52. The Committee noted that its calculation "is likely to understate the full extent of the carriage problem" since only about half of the cable systems surveyed responded to the

Commission. *Id.* at 52 n.52. The staff report also showed that 974 responding cable systems had repositioned channels of local TV stations a total of 3,000 times.

[9]*Id.*

[10]H.R. REP. NO. 101-682, 101st Cong., 2d Sess. at 58. *See also* House Report at 54 ("All evidence indicates that, once a television set is connected to a cable system, consumers will not watch signals available only over-the-air."). These legislative findings are consistent with Chairman Sikes testimony that stations deleted from a local cable system "would probably fail." Testimony of Alfred C. Sikes before the Senate Committee on Commerce, Science and Transportation, June 20, 1991 at 46-47.

[11]House Report at 51.

[12]*Id.* at 51-52.

[13]*Id.* at 50.

[14]Fratrik, A-B Switch Availability and Use, Sept. 23, 1991, attached to Comments of the National Association of Broadcasters in MM Docket No. 90-4, Sept. 25, 1991. Of those households with A/B switches, only half of those surveyed could recall ever using the device. *Id.*

[15]House Report at 54.

[16]Both the Senate bill, S. 12, and the recently-passed House version, H.R. 4850 contain full must carry requirements for cable systems.

[17]As I have noted on numerous occasions, and reiterate here, I believe an adequately supported must carry rule will survive judicial scrutiny. But with the track record of these rules in court, it seems that a more narrowly tailored approach — as was proposed in this proceeding — would be easier to sustain.

[18]Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1459 (D.C. Cir. 1985), *cert. denied sub nom.* National Ass'n. of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986). *See also id.* at 1463 ("We stress that we have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment.").

[19]*Century Communications Corp.* v. FCC, 835 F.2d 292, 304 (D.C. Cir.), *clarified*, 837 F.2d 517 (D.C. Cir. 1987), *cert. denied*, 468 U.S. 1032 (1988).

[20]*Id.* at 304-05, quoting *Quincy Cable TV*, 768 F.2d at 1457-59 (citation omitted).

[21]*Id.* at 304 (emphasis added).

[22]879 F.2d 1540 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 839 (1990).

[23]*Id.* at 1549, citing *Quincy Cable*, 768 F.2d at 1454.

[24]*Id.* at 1550.

[25]*Id.*, quoting United States v. Albertini, 472 U.S. 675 (1985).

[26]768 F.2d at 1442.

[27]*Id.* at 1442-43.

[28]*Id.* at 1457.

[29]835 F.2d at 304 ("Our decision today is a narrow one. We hold simply that, in the absence of record support to support its policy, the FCC's reimposition of must-carry rules on a five-year basis neither clearly furthers a substantial governmental interest nor is of brief enough duration to be considered narrowly tailored. . . .").

[30]*Id.* at 302-03.

[31]*Review of the Commission's Regulations Governing Television Broadcasting*, FCC 92-209 (released June 12, 1992) ("In 1989, at least 25 percent of stations in the top ten markets experienced losses; aggregate losses occurred in most markets below the top 100; and at least 50 percent of independents in all market classes below the top ten experienced losses.").

[32]Office of Plans and Policies Working Paper #26, *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996, 3999 (1991); *Review of the Policy Implications of the Changing Video Marketplace*, 6 FCC Rcd. 4961 (1991).

[33]*Quincy Cable TV*, 768 F.2d at 1461, 1462.

[34]Report and Order at ¶ 27.

[35]The fact that the Commission will not seriously consider prospective requests for relief is reinforced by the additional factors set out in the *Report and Order* — almost all of which are expressed

in the past tense (*e.g.*, Commission will consider whether cable operator "received a substantial number of subscriber complaints."). *See* ¶ 27.

[36] *Evaluation of the Syndication and Financial Interest Rules*, 6 FCC Rcd. 3094 (1991), *modified*, 7 FCC Rcd. 345 (1991), *appeal pending* No. 91-2350 (7th Cir.).

[37] *Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd. at 594 (Concurring Statement of James H. Quello).

[38] Hernstadt v. FCC, 677 F.2d 893, 906 (D.C. Cir. 1982), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (interim citations omitted).

June 18, 1992

CONCURRING STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Report & Order on Network Ownership of Cable Systems
(MM Docket No. 82-434)

I support the elements of this Report & Order that allow broadcast networks to diversify and integrate into cable system ownership subject to certain behavioral safeguards. I have serious reservations, however, about those portions of this decision which impose caps on the growth of network-owned cable systems.

The record now before us demonstrates that the original reason for the network/cable cross-ownership ban -- to prevent the broadcast networks from stifling the growth of a nascent cable industry -- is outmoded and irrelevant. That record also demonstrates, however, that other, important public interest concerns, such as the continued existence of free, over-the-air television, could be at risk should that ban be eliminated without narrowly-targeted safeguards.

In my view, imposition of a local growth cap on top of a "negative must-carry" safeguard is overbroad and unnecessarily intrusive. Local caps are neither the most direct nor the most efficient means of guarding against potential anticompetitive conduct. Indeed, they remind me of the addlepated gardener's efforts to keep weeds out of his garden: by building a fence through the middle of it, rather than simply pulling the weeds up by their roots.

Building a wall around cable growth, even just for cable systems that are network-owned, is an unnecessarily blunt instrument against potential anticompetitive abuses -- especially when specific behavioral safeguards are available and, pursuant to this Report & Order, already in place.

Local affiliates and independent broadcasters have presented compelling arguments about the potential for a network-owned cable system to undercut its competitors' (the local broadcasters) appeal to local (and national) advertisers by either dropping them from the system or moving them up the dial to "cable Siberia". Still, in the absence of other local multichannel distributors, this sort of discrimination is best addressed through specific behavioral safeguards, not Maginot Line-like fence-building.

Moreover, local growth caps have the added disadvantage of imposing substantial transaction costs on any network merger with, or purchase of, a multi-system cable operator -- with no discernible benefits from those costs that could not be accomplished through a more targeted means. Consider this: under the rules we adopt today, a network seeking to combine with an existing multi-system cable operator will have to sell off all the systems operating in the same market as its owned and operated stations, as well as those cable franchises passing in excess of 50% of the local homes in any other market. By the time the regulatory required sales are completed the transactions costs may actually exceed the value of the acquired systems!

The Report and Order similarly lacks any real rationale for its cap on the percentage of homes a network's cable systems can pass nationwide -- other than that the networks were willing to cede to such a restriction. As this Commission has long recognized, concerns over the power of cable reside fundamentally in the local distribution market. While horizontal growth might have implications for the creation and distribution of national programming services, the Report and Order does not even begin to address this matter which this Commission, in any event, has previously found not to warrant caps on growth. See Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service (1990 Report to Congress), ¶¶ 91, 127.

While the benefits of these artificial caps on network growth are thus at best unclear, their burdens are readily apparent. Nonetheless, even though I would have favored more carefully tailored and less burdensome protections for local broadcasters' legitimate interests, I believe it is appropriate for us to substantially relax the ban on network ownership of cable television systems. Accordingly, I vote in favor of today's Report and Order.

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June 18, 1992

STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT
CONCURRING IN PART, DISSENTING IN PART

In Re: Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Change the Prohibition on Common Ownership of Cable Television Systems and National Television Networks (MM Docket No. 82-434).

The Commission through its action today has provided needed flexibility in the video marketplace. Our decision modifying the network/cable cross-ownership rule demonstrates once again that this Commission is willing to respond to marketplace realities.[1] The approach we adopt is one whereby we gradually progress towards total elimination of the rules. To ensure that our presumptions are not incorrect concerning the marketplace, we have provided for moderate safeguards.[2] I support this approach.[3] I concur in the Report and Order because my preference was for a clear sunset of the rules on a date certain which would have placed the burden on the Commission to justify retention of the rules or the rules automatically would be eliminated. I believe the record in this proceeding justifies such action.

While I support the adoption of the interim structural and behavioral safeguards, I do have some strong reservations about the majority's recommendation to Congress to eliminate the broadcast/cable cross-ownership rule. I do not believe that the

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[1] See Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd 3094 (1991), on reconsideration, 7 FCC Rcd 345 (1991).

[2] I fully support the Commission's determination not to apply the local limits in situations where the network-owned cable system is a "competing" system. Such overbuild situations offer an opportunity to truly provide direct competition to cable and should be encouraged by the Commission.

[3] I also support consideration of an affirmative "must carry" rule in the pending proceeding addressing the must carry issue. See Further Notice of Proposed Rulemaking, MM Docket No. 90-4, 6 FCC Rcd 4545 (1991). I also note that Congress has before it legislation on cable which currently provides for must carry rules.

Commission has developed a record in support of its recommendation.[4] Accordingly, I must dissent to that part of the Report and Order.

As justification for the rule's elimination the Report and Order states that the same rationale supporting modification of the network/cable rule invalidates the broadcast/cable rule. It also cites to the Staff Report on the Video marketplace.[5] It fails, however, to independently reach any conclusions as to the public interest benefits or detriments to elimination of the rule. Congress obviously believed there were different rationales supporting the rules or it would not have codified the broadcast/cable restriction in the Cable Communications Policy Act of 1984 and not the network/cable rule.[6]

Perhaps, the fact that parties commenting in this proceeding did not fully address this issue explains the lack of well-thought out commentary. I question whether parties had adequate notice that the Commission even contemplated making such a recommendation to Congress. The Second Further Notice of Proposed Rule Making[7] in this proceeding, instead of seeking comment on recommendations to Congress to eliminate the rule, asked whether the rule provided a further safeguard to address concerns with modification or elimination of the network/cable rule. Specifically, the Second Further Notice stated:

> Parties may also wish to consider the extent to which other existing rules - - such as the local broadcast station-cable cross-ownership rule . . .might ameliorate some of the enumerated concerns.[8]

The network/ cable safeguards the Commission adopts today were based on the national and local market structure that exists

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[4] In 1990 when the Commission made recommendation to Congress on cable we sought comment from interested parties on relevant issues. See Report in MM Docket No. 89-600, 5 FCC Rcd 5005 (1990). The recommendation made in this Report and Order should have received the same treatment.

[5] See F. Seltzer and J. Levy, Broadcast Television in a Multichannel Marketplace (Staff Report), FCC, Office of Plans and Policy Working Paper No. 26, June 1991.

[6] See Cable Communications Policy Act of 1984, Public Law 98-549, 98 Stat. 2780, § 613 (a) (1984).

[7] 7 FCC Rcd 586 (1991).

[8] Second Further Notice, 7 FCC Rcd at 588.

today which includes a prohibition on broadcast/cable cross-ownership. In the Report and Order, we examined the markets in which networks could own cable systems. This analysis assumed that the broadcast/cable rule, which prohibits networks from owning cable in markets where they have owned and operated stations, would be in effect. An analysis of the legal, economic and policy ramifications from removal of the broadcast/cable restriction should have been completed before a specific recommendation was made to the Congress.

In this regard, I also note that the Commission has pending a proceeding examining the video marketplace which could result in elimination or significant modification of the television duopoly rule and the one-to-a-market rule.[9] In addition, the Commission has recently made a determination to allow existing full service broadcast television station the ability to operate its existing NTSC channel along with an advanced television channel for a period of time without the additional channels counting for multiple ownership purposes.[10] With the changes in the radio ownership rules already adopted by this Commission[11], the potential impact on diversity and competition in the local market must be considered before making a recommendation to Congress to eliminate the broadcast/cable cross-ownership restriction. At a minimum, the Commission should have sought comment on the advisability of its recommendation in light of the changes to the network/cable cross-ownership rule.

With respect to the lack of a definitive sunset requirement, I agree with the commenters who suggest the network/cable rule may have outlived its usefulness. I understand the need to test this conclusion and further appreciate the need to provide safeguards to transition towards the eventual elimination of the rule. I disagree with the proposition that the Commission should only provide for review of the rules with presumptions for elimination. I supported the establishment of a date certain for

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[9] See Notice of Proposed Rulemaking (Review of the Commission's Regulations Governing Television Broadcasting), MM Docket No. 91-221, adopted May 14, 1992. The Commission also has pending a proceeding examining whether television satellite stations should continue to be exempt from the national multiple ownership rule. See Second Further Notice of Proposed Rule Making, MM Docket No. 87-8, 6 FCC Rcd 5010 (1991).

[10] See Second Report and Order/Further Notice of proposed Rulemaking (Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service), MM Docket No. 87-268, adopted April 9, 1992.

[11] See Report and Order (Revision of radio Rules), MM Docket No. 91-140, 7 FCC Rcd 2755 (1992).

elimination of the rule. Such a sunset provision would require those desirous of retaining the rule to affirmatively demonstrate a need for retention. It would not permit the retention of the rules merely by the inaction of the Commission. If the Commission determined that total elimination was not in the public interest, it maintains the ability to retain the rule. Without a sunset provision, the Commission could delay addressing the issues indefinitely.

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June 18, 1992

SEPARATE STATEMENT
OF COMMISSIONER ERVIN S. DUGGAN

In the Matter of Common Ownership of Cable Television Systems and National Television Networks (MM Docket No. 82-434)

Today, in response to the rapidly changing and highly competitive television marketplace, another regulatory barrier falls: the Commission's long-standing prohibition on network-cable cross-ownership.

I support bringing this barrier down. In fact, exactly two years ago today, I asked my colleagues in a memorandum to consider re-examining this prohibition. I said that, in my judgment, the absolute ban no longer appeared necessary to protect the public interest in competition and diversity in the television industry. The record accumulated in this proceeding fully supports that assessment.

I have also said in the past, however, that safeguards to protect local television stations would be important to me in considering a change in this rule. I note with approval, then, the caution with which the Commission is doing away with the outright cross-ownership prohibition. I believe that our caution is more than justified. The major actors in the broadcast and cable industries are economically powerful entities. In permitting them to join hands, we are relying on certain predictive judgments about where to draw lines protecting competition, diversity and broadcasting in the public interest. I believe that strong safeguards are essential to protect those principles until we have empirical evidence about how the rule changes actually affect the video marketplace.

The restrictions we adopt today--- a 10% national ownership cap, a 50% local ownership cap, and behavioral rules to guard against carriage abuses, channel positioning and affiliate bypass--- are, in my judgment, the minimum acceptable limits on network-cable combinations as we remove the prohibition. I would have supported even more stringent measures, including an affirmative carriage rule, for which Commissioner Quello has been a strong and eloquent advocate. Mandatory carriage was amply supported in the record; it appeared to be acceptable to the parties directly interested in relaxing the cross-ownership ban; it could have been narrowly tailored, in my judgment, to preserve the unique competitive balance between networks, over-the-air broadcasters and cable systems; and, in my view, it carried

strong public interest weight. I regret, therefore, that it has not been possible to persuade a majority to support affirmative must-carry today.

Given this view of mine, let me stress that I do not intend for our adoption of a "negative must-carry" safeguard to prejudice the Commission's ability to impose an affirmative carriage requirement in the future. If anticompetitive actions by network-cable combinations do occur under our new rules, and if "negative must-carry" proves to be an ineffective remedy, the imposition of stronger limits will be essential, and I will support them. Meanwhile, I must satisfy myself that the Commission has worked hard to include protections for local broadcasters in this proceeding.

It could have been otherwise. Indeed, several participants, including the Department of Justice, professed to see no rationale for any safeguards. We have heard similar arguments in other recent proceedings, and I continue to find them unpersuasive. Should the U.S. Forest Service wait until half its timber is burning before it makes rules about campfires? Of course not. And neither must this Commission wait until local, over-the-air broadcast stations are severely harmed in a network-cable world before establishing rules designed to deter such harm. To take so passive an approach would fly in the face of this Commission's well-established authority to advance the public interest in competition and diversity through prudent, carefully tailored rules. See, e.g., Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

Our action today accepts the argument that the major broadcast networks must diversify their businesses to bolster their balance sheets. I agree with my colleagues on that score. I am also concerned, however, that we not allow our legitimate concern about the networks' future to swamp our historic commitment to individual, over-the-air affiliate and independent television stations. These local stations remain vital as outlets for news, entertainment, public affairs and children's programming--- a host of services that are at the core of broadcasting's public interest mandate. The Commission, therefore, must care about the long-term health of broadcast television stations as zealously as it cares about the welfare of the networks.

Let me add a final note: I have heard assertions that this decision cannot be squared with the Commission's measured relaxation of the Financial Interest and Syndication rules in April 1991. To the contrary, I believe our action today is entirely consistent and symmetrical with that result. In each case, we acknowledged that fundamental changes in the television

marketplace compelled us to adjust our rules to new realities. In each case, we expressed concern about the continuing power of the networks to use their leverage over other participants in the marketplace in a way that could erode diversity and harm the public interest. In each case, we removed an outright prohibition on the networks and permitted them to enter related lines of business, subject to structural and behavioral safeguards. In each case, finally, we called for an eventual review of the rule changes and raised the possibility of further deregulation, if warranted. In view of these obvious similarities, I can see little merit in the notion that our reasoning in this action is inconsistent with that in the fin-syn proceeding.

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